IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

JESSE VROEGH, ***Plaintiff*,** **v.** **IOWA DEPARTMENT OF CORRECTIONS, IOWA DEPARTMENT OF ADMINISTRATIVE SERVICES, and PATTI WACHTENDORF, Individually and in her official capacities,** ***Defendants*.**	**Case No. LACL138797** **RULING ON DEFENDANTS' MOTION FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT.**

Defendants Motion for New Trial and Judgment Notwithstanding the Verdict came on for hearing before the Court on December 6, 2019. The Court also heard arguments regarding attorney's fees. The parties were permitted to file supplemental briefs. The matter was considered fully-submitted on December 23, 2019.

The Plaintiff, Jesse Vroegh ("Vroegh"), was represented by attorneys Melissa Hasso, Rita Bettis Austen, and Shefali Aurora. The Defendants, the Iowa Department of Corrections, the Iowa Department of Administrative Services, and Patti Wachtendorf (collectively "the State" or "Defendants") were represented by Assistant Attorney General William Hill.

I. STATEMENT OF THE FACTS AND PROCEDURAL POSTURE

Vroegh is a transgender male. From July 2009 until 2016, he worked for the Iowa Correctional Institution for Women ("ICIW"). In 2014, Vroegh notified his employer that he was transitioning from female to male. After telling his supervisor, Vroegh sought to use the men's restrooms and locker rooms. However, ICIW denied him access to those facilities. Vroegh commenced this action on August 28, 2017. He alleged that the Iowa Department of Corrections ("IDOC") and Ms. Wachtendorf, the warden of ICIW at the time, discriminated against him based on his sex and gender identity in violation of the Iowa Civil Rights Act of 1965 ("ICRA") when they denied him the right to use the men's restrooms and locker rooms.

Vroegh also claimed that the Iowa Department of Administrative Services ("DAS") discriminated against him because of his sex and gender identity in violation of the ICRA. Specifically, Vroegh claimed DAS violated the law by discriminatorily providing and/or administering his health insurance benefits by excluding coverage for medically necessary gender confirmation surgery (GCS) under both Iowa Code sections 216.6 and 216.6A.

Trial began on February 9, 2019. At the close of evidence, the State moved for a directed verdict. The Court overruled the Motion and submitted the case to the jury for its decision. The jury delivered its verdict on February 14, 2019, finding in Vroegh's favor as to both claims. In reaching its verdict, the jury found that IDOC and Ms. Wachtendorf discriminated against Vroegh on the bases of sex and gender identity, awarding Vroegh $100,000 in past emotional distress damages. The jury also found DAS discriminated against Vroegh by providing and/or discriminatorily administering employment benefits, awarding Vroegh $20,000 in past emotional distress damages. The jury further found DAS did not prove its affirmative defense that it was motivated by some non-discriminatory purpose when it denied Vroegh benefits.

On February 25, 2019, the State filed the Motion now before the Court. The State alleges the Court should grant its Motion because (1) Ms. Wachtendorf was sued in her individual and official capacity, but Vroegh only presented evidence to prove she acted within the scope of her professional role, and (2) Vroegh lacked substantial evidence to prove each element of his sex discrimination and 216.6A claims. In the alternative, the State seeks a new trial on a number of grounds, including:

> (1) That it was legal error to allow Vroegh's sex discrimination claim to be submitted to the jury;
> (2) The Court should have directed a verdict on Vroegh's sex discrimination claim and, as a result, the jury's sex discrimination verdict is contrary to law;
> (3) The jury's verdict for sex discrimination is not sustained by sufficient evidence;

(4) The Court's answer to the sole jury question on the definition of "sex" was legal error warranting correction now;
(5) It was reversible error to deny the State's "Business Judgment" jury instruction;
(6) It was legal error to keep out evidence of Vroegh's character for untruthfulness and potential motive;
(7) The Court committed errors of law that substantially prejudiced the State by permitting multiple jury instructions, including instructions 10, 11, 12, 13, 15, 16, 17, and 21; and
(8) The State is entitled to a new trial or remittitur based on the excessive nature of the $120,000 damages award that was based on passion or prejudice against the State rather than the evidence presented at trial.

Vroegh timely resisted the State's Motion. Vroegh also asks the Court to award attorney fees for the reasonable cost of her counsel. Defendants have timely resisted Vroegh's request for attorney fees.

II. STATEMENT OF THE LAW

A. Judgment Notwithstanding the Verdict.

A judgment notwithstanding the verdict in a party's favor is appropriate, even in the event of an adverse verdict, in two instances. Iowa R. Civ. Pro. 1.1003 (2020). First, if an adverse party fails to allege some material fact necessary to constitute a complete claim or defense in their pleadings and the motion notes these failures, then the party should be awarded judgment notwithstanding the verdict. *Id.* at (1). Secondly, if the movant was entitled to a directed verdict at the close of all the evidence and moved for the directed verdict, and the jury did not return such verdict, then the Court can either grant a new trial or enter judgment as though it had originally directed a verdict for the movant. *Id.* at (2).

A motion for judgment notwithstanding the verdict is intended to allow the district court the opportunity to correct any error in denying a motion for directed verdict. *Easton v. Howard*, 751 N.W.2d 1, 4 (Iowa 2008). Accordingly, a Rule 1.1003 motion must rely on matters raised in a previous motion for directed verdict. *Id*. at 4-5. In considering the motion, the Court is to decide

whether there was sufficient evidence to justify submitting the disputed issue to the jury. *Id*. In doing so, the Court views the evidence in the light most favorable to the nonmoving party. *Id*. Each element of the disputed issue must be supported by substantial evidence. *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997). If there is not substantial evidence in support of each claim, the motion for judgment notwithstanding the verdict should be granted. *Carr v. San-Tan, Inc.*, 543 N.W.2d 303, 305 (Iowa Ct. App. 1995). Evidence is substantial if a reasonable mind would find it adequate to support a finding. *Magnusson Agency*, 560 N.W.2d at 25.

Alternatively, a judgment notwithstanding the verdict is inappropriate when the nonmoving party has presented substantial evidence in support of their claims. *Kamerick v. Wal-Mart Stores, Inc.*, 503 N.W.2d 24, 26 (Iowa Ct. App. 1993). The nonmoving party is entitled to every reasonable inference from the evidence. *Id*. at 25. If reasonable minds could differ on the issue, then it is proper to submit the claims to the jury and its verdict should be upheld. *Id*.

B. Motion for New Trial.

Iowa Rule of Civil Procedure 1.1004 provides that an aggrieved party "may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted" in certain enumerated instances which materially affected the movant's substantial rights. Rule 1.1004 enumerates nine different causes warranting a new trial. Iowa R. Civ. Pro. 1.1004(1)-(9) (2020). These causes, sometimes referred to as factors, are:

(1) Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court [] or abuse of discretion which prevented the movant from having a fair trial.
(2) Misconduct of the jury or prevailing party.
(3) Accident or surprise which ordinary prudence could not have guarded against.
(4) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.

(5) Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property.
(6) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.
(7) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial.
(8) Errors of law occurring in the proceedings, or mistakes of fact by the court.
(9) On any ground stated in rule 1.1003, the motion specifying the defect or cause giving rise thereto.

Id. The district court is not limited to the causes set forth under the Rule when determining whether or not to grant a new trial. *Lehigh Clay Products, Ltd. v. Iowa Dept. of Transp.*, 512 N.W.2d 541, 543-44 (Iowa 1994). However, if the Court fails to make a finding based on the enumerated causes for a new trial, the Court must have a reason for justifying the grant of a new trial. *Id*. at 544. "In ruling upon motions for a new trial, the district court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R. App. Pro. 6.904(3)(c) (2020).

A new trial motion can be joined with a motion for judgment notwithstanding the verdict without waiving the right to file or rely on one or the other. Iowa R. Civ. Pro. 1.1008(1) (2020). If such motions are joined, then the Court must make a conditional ruling on the new trial motion and specify the grounds for granting or denying the motion. *Id*. at 1.1008(3). This conditional ruling by the Court recognizes the potential that the grant of judgment notwithstanding the verdict may be vacated. *Holdsworth v. Nissly*, 520 N.W.2d 332, 336 (Iowa Ct. App. 1994).

Iowa law requires the grounds relied on by the moving party to be both material and prejudicial in order to reverse a jury finding. Iowa Code § 624.15 (2020).

III. ANALYSIS AND CONCLUSIONS OF LAW

The Court finds it necessary to provide a short roadmap of its analysis. First, the Court has provided an overview of the ICRA. Second, the Court finds that "sex" as provided in the ICRA

can include protections for those who are transgender. Trans individuals can thus maintain a sex discrimination claim under the ICRA without creating redundancies between gender identity and sex protections. In so finding, neither term becomes superfluous, as the ICRA was intended to be broad in both construction and interpretation. It is because of this statutory breadth that the overlap of any one term, be it substantial or otherwise, does not create superfluity within the Statute because at least one term applies to something that the other does not. Therefore, it was not legal error to permit Vroegh's sex discrimination claim to proceed to verdict, and the resulting verdict was not contrary to law.

Third, the Court determines that the jury verdict on sex discrimination was sustained by sufficient evidence. Fourth, the Court has found its answer to the sole jury question was not in error. Fifth, no legal error resulted in denying Defendants' business judgment jury instruction. Sixth, no error resulted from excluding evidence of Vroegh's motive in bringing this action or in excluding prejudicial evidence surrounding Vroegh's termination from ICIW. Seventh, the Court finds there was no error in the jury instructions. Eighth, the Court finds Defendants are not entitled to remittitur as the award was within the reasonable range of damages and sufficient evidence supports the damages awarded that do not otherwise shock the conscience. Ninth, the Court determines Wachtendorf was properly sued in her individual capacity under the ICRA. Tenth, Vroegh's sex discrimination claims and 216.6A claims were proper and thus granting Defendants' judgment notwithstanding the verdict would be improper. Eleventh, the Court finds that Defendants were not entitled to the same decision affirmative defense and its related jury instruction due to waiver. Twelfth, the Court addresses and awards reasonable attorney's fees and costs to Vroegh, as permitted under the ICRA.

A. Overview of the Iowa Civil Rights Act and Associated Sex Discrimination Claims.

The ICRA was modeled after the federal antidiscrimination law, Title VII. *See Estabrook v. Iowa Civil Rights Comm'n*, 283 N.W.2d 306, 309 (Iowa 1979). First enacted in 1965, the ICRA now applies to nearly all types of discrimination in employment, housing, education, credit, and public accommodations. *See* Iowa Code § 216 (2020). The Statute provides protection for individuals discriminated against on the basis of age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability. *See* Iowa Code § 216.6(1)(a). However, sex was not added to the list until 1970. *See* Iowa Acts 1970 (63 G.A.) Chapt. 1058, § 3; Iowa Code § 601A.6(1)(a) (1971). In 1972, protections were added on the bases of age and disability. *See* Iowa Acts 1972 (64 G.A.) Chapts. 1031, § 3; 1032, § 1. It was not until 2007 that the legislature added protections for sexual orientation and gender identity discrimination. *See* Iowa Code § 216 (2008).

Generally, the ICRA's protections are derived from statute instead of an individual's constitutional rights. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010); *Godfrey v. State*, 898 N.W.2d 844, 874-75 (Iowa 2017) (citing *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 472 (Iowa 1983)); *Estabrook*, 283 N.W.2d at 209. To the extent the ICRA's legislative history is important, the courts recognize "there is surprisingly little [legislative history] to discover." *Vivian v. Madison*, 601 N.W.2d 872, 874 (Iowa 1999). "Our only sources of interpretive guidance come from section 216.18, which states that the chapter should be construed broadly to effectuate its purposes." *Id.*; Iowa Code § 216.18(1) (2020). Iowa courts have observed that the purpose of the ICRA has always been to "eliminate unfair and discriminatory practices," as well as to "correct a broad pattern of behavior rather than merely affording a procedure to settle a specific dispute." *Cote v. Derby Ins. Agency, Inc.*, 908 N.W.2d 861, 865 (Iowa 2018) (quoting *Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 464 (Iowa

2017)). Our Supreme Court has also determined the legislature's intent in banning sex discrimination was "to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred." *DeBoom v. Raining Rose, Inc.*, 772 N.W.2d 1, 6 (Iowa 2009) (quoting *Sommers*, 337 N.W.2d at 474). Importantly, the ICRA does not define "sex." *See, in absentia,* Iowa Code § 216.2 (2020).

"[A]n employer engages in unlawful sex discrimination when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer's decision." *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64, 67 (Iowa 2013) (internal citations omitted). "A decision based on a gender stereotype can amount to unlawful sex discrimination." *Id*. at 71 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), *superseded by statute*, Civil Rights Act of 1991) (other internal citations omitted). When evaluating sex discrimination cases, Iowa courts adhere to the analytical framework of Title VII. *Hedlund v. State*, 930 N.W.2d 707, 719 (Iowa 2019) (quoting *DeBoom*, 772 N.W.2d at 10). In bringing a claim, the plaintiff has the burden of establishing a prima facie case by proving discrimination was a motivating factor in the employer's actions. *Hawkins v. Grinnell Reg'l Med. Ctr.*, 929 N.W.2d 261, 272 (Iowa 2019) (citing *Price Waterhouse*, 490 U.S. at 244-45). Once established, "the employer could avoid liability 'by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender [or other protected characteristics] into account.'" *Id*. (quoting *Price Waterhouse*, 490 U.S. at 258).

B. Motion for New Trial: Vroegh's Sex Discrimination Claim.

Defendants allege three errors warrant a new trial regarding Vroegh's sex discrimination claim. First, they allege it was legal error to permit Vroegh's sex discrimination claim to proceed to the jury, and the resulting verdict in Vroegh's favor was contrary to law. Second, Defendants

allege the jury verdict is not supported by sufficient evidence. Third, Defendants allege the Court's answer to the jury question on the definition of "sex" was legal error. The Court will address each claim in-turn.

1. Whether it was Legal Error to Permit Vroegh's Sex Discrimination Claim.

Defendants claim it was legal error to permit Vroegh's sex discrimination claim because his claim is excluded from the protections of the ICRA. To support this claim, Defendants rely on *Sommers v. Iowa Civil Rights Commission* and its holding that sex discrimination does not protect "transsexuals."[1] 337 N.W.2d at 474. The Court finds Defendants' reliance on *Sommers* misplaced.

In *Sommers*, the Iowa Supreme Court considered whether the ICRA prohibited employment discrimination based on transsexuality. *Id*. at 471. Sommers identified as a transsexual woman. *Id*. She dressed as a female while at work, but was told she could not use the restrooms while there. *Id*. Sommers was later fired. *Id*. She then filed her lawsuit under the ICRA alleging sex and disability discrimination as the reason for her firing. *Id*.

In evaluating Sommers's claims, the Court contrasted transsexualism with homosexuality and transvestism. *Id*. at 473. In its brief discussion on the meaning of "sex," the Court determined that because the legislature did not expressly include transsexuals as a protected class, those persons do not fall within the ICRAs protections. *Id*. at 474. It then held that transsexuals were excluded because the legislature's intent was to equalize men and women in the workplace, and "to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred." *Id*. The Court defined "sex" narrowly, finding the term only included male

[1] The Court recognizes *Sommers* uses the term "transsexual." However, the Court when referencing this instant case will use the term "transgender" or "trans individual/person" to describe Vroegh or the transgender community.

or females based on their anatomy, not their gender. *Id*. at 473. The Court thus held transsexualism was not included in the ICRA's definition of "sex." *Id*. at 477.[2]

Sommers remains, in many ways, good law. For instance, it is still cited for its administrative standard of review statement. *Id*. at 472, 475-76. Likewise, *Sommers* has also been relied on for its definition of the terms "substantially handicapped person" and "major life activities" under the ICRA. *Id*. at 474-77.[3] It has also been cited for its summary of Iowa's statutory construction maxims. *Id*. at 472-73. Nevertheless, almost forty years later, *Sommers* has little to offer in defining "sex" for purposes of ICRA discrimination claims.

To place *Sommers* into context, it has been cited and discussed in 44 decisions since its 1983 publication. Six of the 44 cases referencing *Sommers* have decided sex discrimination claims, four of which were from Iowa.[4] One Iowa case mentioned *Sommers* within the facts when deciding a gender identity discrimination claim.[5] Five of the 44 cases reference *Sommers* for the reason sex discrimination is prohibited under the ICRA.[6] 19 of those case references are for the administrative

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[2] The Court additionally found that being transsexual did not qualify as a disability for purposes of the ICRA's protections. *Sommers*, 337 N.W.2d at 475-77. However, neither party here claims being transgendered is a disability.

[3] Notably, Iowa Code § 216.6(1) (1997) reflects a change in the ICRA's terminology. The legislature's 1996 amendment substituted "persons with disabilities" in place of "the disabled" or "disabled person" and substituted "disabilities" in place of "handicap."

[4] (1) *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10-11, 15 (Iowa 2010) (holding incarcerated woman could be an employee for purposes of the IRCA when bringing a sexual harassment and retaliation claims); (2) *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, (Iowa 2009) (sex and pregnancy discrimination); (3) *Arledge v. Peoples Servs., Inc.*, 2002 WL1591690, *1-2 (N.C. Super. Ct. Apr. 18, 2002) (declining to find transsexualism protected as sex discrimination claim); (4) *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, (N.J. Super. Ct. App. Div. 2001) (transsexual status protected as sex discrimination); (4) *Dobre v. National R.R. Passenger Corp. (AMTRAK)*, 850 F.Supp. 284 (E.D. Pa. 1993) (sex and disability discrimination against transsexuals not protected); (5) *Lynch v. City of Des Moines*, 454 N.W.2d 827, (Iowa 1990) (sex discrimination against a woman); (6) *Mowrey v. Iowa Civil Rights Comm'n*, 424 N.W.2d 764, 768 (Iowa Ct. App. 1988) (sex and disability case brought by female machine operator).

[5] *Good v. Iowa Dept. of Human Servs.*, 924 N.W.2d 853 (Iowa 2019) (*Sommers* included in factual background).

[6] (1) *Ruden v. Peach*, 904 N.W.2d 410, n. 3 (Iowa Ct. App. 2017); (2) *Deboom*, 772 N.W.2d at 6; (3) *Gross v. FBL Fin. Servs., Inc.*, 588 F.3d 614, 619 (8th Cir. 2009); (4) *Enriquez*, 777 A.2d at 372; (5) *Lynch*, 454 N.W.2d at 834.

standard of review.[7] 14 cases regard disability discrimination claims.[8] Further, five of the 44 cases have referenced *Sommers* for its discussion on the pillars of statutory construction.[9] Five cases regard sexual orientation claims.[10] One case agrees with *Sommers* in holding that gender confirmation surgery (GCS) is the only permanent form of treatment for gender dysphoria.[11] All of this is to show that *Sommers*, by the weight of its treatment, has been abrogated as it relates to its limited understanding of sex discrimination. *Sommers* becomes more concerning when viewed within the context of subsequent cases addressing sex discrimination.

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[7] (1) *Smith-Porter v. Iowa Dept. of Human Servs.*, 590 N.W.2d 541, 545 (Iowa 1999); (2) *Iowa Civil Rights Comm'n v. Deere & Co.*, 482 N.W.2d 386, (Iowa 1992); (3) *Henkel Corp. v. Iowa Civil Rights Comm'n*, 471 N.W.2d 806, 809 (Iowa 1991); (4) *Hope Evangelical Lutheran Church v. Iowa Dept. of Revenue and Fin.*, 463 N.W.2d 76, (Iowa 1990); (5) *Hearst Corp. v. Iowa Dept. Revenue and Finance*, 461 N.W.2d 295, (Iowa 1990); (6) *Annear v. State*, 454 N.W.2d 869, 875 (Iowa 1990); (7) *Hollinrake v. Iowa Law Enforcement Academy, Monroe Cty.*, 452 N.W.2d 598, 601 (Iowa 1990); (8) *Office of Consumer Advocate, Consumer Advocate Div., Dept. of Justice, State of Iowa v. Utilities Bd., Utilities Div., Dept. of Commerce, State of Iowa*, 452 N.W.2d 588, 592 (Iowa 1990); (9) *Probasco v. Iowa Civil Rights Comm'n*, 420 N.W.2d 432, (Iowa 1988); (10) *Des Moines Indep. Comm. Sch. Dist. v. Dept. of Job Serv.*, 376 N.W.2d 605, 609 (Iowa 1985); (11) *Miller v. Civil Constructors*, 373 N.W.2d 115, 117 (Iowa 1985); (12) *Meads v. Iowa Dept. of Social Servs.*, 366 N.W.2d 555, 558 (Iowa 1985); (13) *Richards v. Iowa Dept. of Revenue*, 362 N.W.2d 486, 487 (Iowa 1985); (14) *Spencer ex rel. Spencer v. White*, 584 N.W.2d 572, 574 (Iowa 1998); (15) *Fischer v. Iowa Civil Rights Comm'n*, 520 N.W.2d 314, 415 (Iowa Ct. App. 1994); (16) *Fellows v. Iowa Civil Rights Comm'n*, 426 N.W.2d 671, 674 (Iowa 1988); (17) *Elliot v. Iowa Dept. of Transp., Motor Vehicle Div.*, 377 N.W.2d 250, 254 (Iowa 1985); (18) *Hearst Corp. v. Iowa Dept. of Revenue and Finance*, 1989 WL428591, *2 (Polk Cty. Dist. Ct. Nov. 6, 1989); (19) *Frank v. American Freight Systems, Inc.*, 398 N.W.2d 797, 799 (Iowa 1987).

[8] (1) *Arledge*, 2002 WL1591690 at *2 (citing *Sommers* in agreement that transsexualism is not a disability); (2) *Conway v. City of Hartford*, 1997 WL78585 (Ct. Super. Ct. Feb. 4, 1997) (finding transsexualism can be mental disability); (3) *Huey v. Swift-Eckrich*, 1996 WL33423406, *5 (N.D. Iowa Jan. 3, 1996); (4) *Nelson v. J.C. Penney Co., Inc.*, 858 F.Supp. 914, 924-25 (N.D. Iowa 1994); (5) *LaFleur v. Bird-Johnson Co.*, 1994 WL878831, *4 (Mass. Super. Ct. Nov. 3, 1994) (finding transsexualism is not a disability), *called into question by Lie v. Sky Pub. Corp.*, 2002 WL 31492397, *6 (Mass. Super. Ct. Oct. 7, 2002); (6) *Dobre*, 850 F.Supp. at 288-89; (7) *Henkel Corp.*, 471 N.W.2d at 809; (8) *Annear*, 454 N.W.2d at 875; (9) *Probasco*, 420 N.W.2d at 434; (10) *Mowrey*, 424 N.W.2d 764; (11) *Doe v. Electro-Craft Corp.*, 1988 WL1091932 (N.H. Super. Ct. Apr. 8, 1988) (finding transsexualism is a protected mental disability); (12) *Brown v. Hy-Vee Food Stores, Inc.*, 407 N.W.2d 598, 600 (Iowa 1987); (13) *Carr v. Gen. Motors Corp.*, 389 N.W.2d 686, (Mich. 1986); (14) *Consolidated Freightways, Inc. v. Cedar Rapids Civil Rights Comm'n*, 366 N.W.2d 522, 527-28 (Iowa 1985).

[9] (1) *Simon Seeding & Sod, Inc.*, 895 N.W.2d at 461; (2) *Renda*, 784 N.W.2d at 15; (3) *Polk Cty. Bd. of Sup'rs v. Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 792 (Iowa 1994); (4) *Brown v. Polk County, Iowa*, 832 F.Supp. 1305, 1311 (S.D. Iowa 1993); (5) *Fellows*, 426 N.W.2d at 674.

[10] (1) *Godfrey v. State*, 898 N.W.2d 844, 874, 877 (Iowa 2017); (2) *Grimm v. US West Comms., Inc.*, 644 N.W.2d 8, 16 (Iowa 2002) (finding transsexuals not a protected because ICRA "does not apply to sexual orientation"); (3) *Conway*, 1997 WL78585 at *7, n.2 (distinguishing transsexualism from sexual orientation); (4) *LaFleur*, 1994 WL 878831 at *4-5; (5) *Opinion of the Justices to the Senate*, 458 N.E.2d 1192, n. 3 (Mass. 1984).

[11] *O'Donnabhain v. C.I.R.*, 134 T.C. 34, 68, 74 (U.S. Tax Ct. 2010).

First, *Sommers* used a restrictive definition of "sex" by interpreting the term to only refer to individuals as either anatomically male or female. 337 N.W.2d at 473. The *Sommers* Court's definition excludes the broader understanding of "gender," which is defined as "sex; the behavioral, cultural, or psychological traits typically associated with one sex." *Gender*, Merriam-Webster Online Dictionary; *see Sex*, Black's Law Dictionary (11th ed. 2019) (defining "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender"); *see also Sommers*, 337 N.W.2d at 473 ("[g]ender relates to behavior, feelings, and thoughts and does not always correlate with one's physiological status"). The Court ultimately determined in *Sommers* that anatomical sex is protected under the ICRA, but gender is not. 337 N.W.2d at 473-74.

However, Iowa courts have distanced themselves from this narrow interpretation. For instance, our appellate courts have often used "gender" interchangeably with "sex.". *See e.g., Nelson*, 834 N.W.2d at 74 ("[c]ourts have generally interpreted 'sex' discrimination in the workplace to mean employment discrimination as a result of a person's gender status") (C.J. Cady concurring); *Gray v. Kinseth Corp.*, 636 N.W.2d 100, 101 (Iowa 2001). Of course, this is not inconsistent with the state of the law following *Sommers*, especially after the United States Supreme Court clarified the intent of Title VII.

In the 1989 case *Price Waterhouse v. Hopkins*, the U.S. Supreme Court held that the term "sex" includes more than just the anatomical binary of male or female denoted at birth. 490 U.S. at 251. In so finding, the Court held Title VII's term "sex" included protections against discrimination based on gender and sex stereotypes. *Id*. at 239, 250-52. That is, discrimination based on gender stereotypes constitutes sex discrimination per se. *Id*. The Court reasoned:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. [I]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

Id. at 251 (internal citations and quotations omitted). The Court recognized "Title VII tolerates no . . . discrimination, subtle or otherwise." *Id*. at 272 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)) (J. O'Connor concurring). This conclusion now applies in Iowa, as our Supreme Court has adopted the *Price Waterhouse* definition of "sex" for cases arising under the ICRA. This is illustrated in *Nelson v. James H. Knight DDS, P.C.*, where the Court held "that a decision based on a gender stereotype can amount to unlawful sex discrimination." 834 N.W.2d at 71 (J. Mansfield) (internal citations omitted). Of course, this directly contrasts the narrow definition of "sex" found in *Sommers*. It is clear to the Court that the meaning of "sex" in *Price Waterhouse* and *Nelson* is mutually-exclusive from the meaning of "sex" found in *Sommers*, That is, it is impossible for "sex" to *only* apply to anatomical sex and also apply to gender and sex stereotypes under the ICRA. It follows then that *Price Waterhouse* and *Nelson* drove the nail into the coffin of *Sommers* and its anatomy-only definition of "sex."

As it applies to this case, the Court finds transgender individuals are included within the ICRA's definition of "sex" for two reasons. First, being transgender directly challenges gender norms and sex stereotypes, which are protected as sex discrimination. Second, it is impossible to separate discrimination based on the anatomical understanding of sex from the concepts of gender and gender identity as it relates to transgender individuals.

The first reason is easy to understand--sex and gender stereotyping protected by state and federal law includes the way an individual looks, acts, and behaves within the definition of "sex." *See Nelson*, 834 N.W.2d at 71; *Smith v. City of Salem, Ohio*, 378 F.3d 566, 571-72 (6th Cir. 2004); *Price Waterhouse*, 490 U.S. at 251-52. Applying this logic to transgender people, sex and gender stereotypes are clearly challenged when an individual transitions to another gender or sex. By definition, transitioning is the process in which a transgender individual changes their looks, behaviors, and actions that are held out to themselves and to society. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 (6th Cir. 2018). This process can involve changing one's name, wardrobe, appearance, as well as receiving medical treatment to begin anatomically aligning their internal and external sexual identities. *Understanding Transgender People: The Basics*, Nat'l Ctr. for Transgender Equality (July 9, 2016). It thus follows that transitioning implicates those stereotypes which qualify as sex discrimination under the ICRA and Title VII.

Second, "It is analytically impossible to [discriminate against] an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 576 (referencing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017)). This is true especially considering trans persons are inherently gender nonconforming because they fail to act or identify with their biological sex. *Id*. (citing *Smith*, 378 F.3d at 575). As the American Psychiatric Association explains, being transgender constitutes "a disjunction between an individual's sexual organs and sexual identity." *Smith*, 378 F.3d at 568. If, as we know to be true, gender and sex stereotypes fall within the gambit of sex discrimination, then one's status as transgender plainly falls within the law's comprehensive definition of "sex."

Thus, contrary to Defendants' assertion, *Sommers*' definition of "sex" does not align with how the Court is to required to evaluate sex discrimination claims today. To find *Sommers* remains good law, as Defendants ask the Court to do, would be to reject the clear mandate of the Iowa and U.S. Supreme Court that discrimination based on sex stereotypes qualifies as sex discrimination under both Title VII and the ICRA. The Court instead observes that the Iowa Supreme Court has abandoned *Sommers* in exchange for the framework of *Price Waterhouse*. Because of this, the Court holds trans individuals can bring a sex discrimination claim under the ICRA because discrimination against those who are transgender is, at least in part, based on their sex, sexual incongruence, or their defiance of gender stereotypes.

Next, Defendants allege that to find the term "sex" includes protections for those who are transgender would be to construe sex and gender identity synonymously, rendering one or both terms superfluous. In so arguing, Defendants raise an issue of statutory construction.

In construing the meaning of a law, the Court "adhere[s] to established standards for the construction of statutes." *In Interest of G.J.A.*, 547 N.W.2d 3, 6 (Iowa 1996). When the legislature has not provided a definition for each term, we usually give those terms their ordinary meaning. *Yates v. U.S.*, 574 U.S. 528, 135 S.Ct. 1074, 1091 (2015) (J. Kagan dissenting, joined by JJ. Scalia, Kennedy, Thomas) (internal citations omitted) (hereinafter "*Yates*"). In doing so, courts should not construe a statute's terms to mean the same thing, thereby rendering certain parts redundant, "unless no other construction is reasonably possible." *Iowa Auto Dealers Ass'n v. Iowa Dept. of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981); *State v. McKinley*, 860 N.W.2d 874, 992 (Iowa 2015). This tool of statutory construction is also known as the surplusage canon. *Yates*, 135 S.Ct. at 1095-96. Courts "consider all parts of the statute without according undue importance to any single or isolated portion." *Iowa Auto Dealers Ass'n*, 860 N.W.2d at 765. Courts must give a reasonable

construction to the statute which best accomplishes the statute's purpose. *In Interest of G.J.A.*, 547 N.W.2d at 6.

When interpreting a statute, context matters. *Yates*, 135 S.Ct. at 1092. "We do not 'construe the meaning of statutory terms in a vacuum.'" *Id*. (quoting *Tyler v. Cain*, 533 U.S. 656 (2001)). Rather, courts interpret particular words and phrases "in their context and with a view to their place in the overall statutory scheme." *Id*. (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). However, overlap between statutory provisions, significant or otherwise, does not necessarily create surplusage. *Id*. at 1095-96. If each provision of the law applies to something the other does not, surplusage does not result. *Id*. This is especially true for broadly written statutes. "It is exactly when [the legislature] sets out to draft a statute broadly--to include every imaginable variation on a theme--that such mismatches [in terms] will arise," but those mismatches do not necessarily create redundancies in the law's terms. *Yates*, 135 S.Ct. at 1098. For courts to respond by narrowing the meaning of an intentionally broad statute "is thus to flout both what [the legislature] wrote and what [the legislature] wanted." *Id*. When a law is intended to be broad, overlapping terms can be considered an expression of "belt-and-suspenders" caution on the part of the legislature in an attempt to best accomplish its policy goals. *Id*. at 1096; *R.G. & G.R.*, 884 F.3d at 578; *Hively*, 854 F.3d at 344.

The ICRA provides protection for individuals discriminated against on the basis of age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability. Iowa Code § 216.6(1)(a) (2020). As Defendants' point out, Title VII's protected classes only prohibit discrimination on the basis of race, color, religion, sex, or national origin. U.S. Code § 2000e-2(b). It is true that the ICRA provides protection on the basis of gender identity or sexual orientation where Title VII has not. Though the plain language of both the ICRA and Title VII

provides enumerated protected classes, those express categories include more than just the narrow dictionary definitions of their meanings. This is illustrated by the Court's previous discussion that discrimination based on gender stereotypes can establish sex discrimination per se. The term "gender stereotype" appears in neither statute, yet it remains protected under the umbrella term "sex." In reference to the ICRA, this is largely true because the Court is directed by the legislature to interpret the statute broadly. Iowa Code 216.18(1) (2020). When the legislature passed the ICRA it was and has always been intended to be a broad statute that is equally broad in its purpose and scope. *Vivian*, 601 N.W.2d at 874.

Of course, the ICRA already provides seemingly-redundant statutory protections, as does Title VII. For instance, claims alleging discrimination based on race can also fall into the ICRA's prohibition for discrimination on the basis of color. Neither race nor color are defined in the ICRA, so the Court should assign the terms their ordinary meaning. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *State v. White*, 545 N.W.2d 552, 555 (Iowa 1996). Race is commonly defined as being (1) American Indian or Alaska Native, (2) Asian; (3) Black or African American, (4) Native Hawaiian or other Pacific Islander, or (5) White. *See* State Data Center, *Race and Ethnicity Classifications*, State Library of Iowa (last accessed Feb. 17, 2020), https://www.iowadatacenter.org/aboutdata/raceclassification; *see also Race/Color Discrimination*, U.S. Equal Employment Opportunity Comm'n (last accessed Feb. 16, 2020), https://www.eeoc.gov/laws/types/race_color.cfm. Color, as a protected class, "involves treating someone unfavorably because of skin color complexion." *Race/Color Discrimination*, U.S. Equal Employment Opportunity Comm'n. Obviously, both terms overlap. Likewise, creed and religion are not defined by the ICRA. Again, the Court should then assign the terms their ordinary meaning. *White*, 545 N.W.2d at 55. The dictionary definition of creed is "a brief authoritative formula of

religious belief; a set of fundamental beliefs." *Creed*, Merriam-Webster Online Dictionary. Again, it is apparent both terms overlap, but the inclusion of overlapping protections does not make their inclusion redundant. *See Yates*, 135 S.Ct. at 1095-96.

Likewise, sex and gender identity protections conform to the same pattern. Although the two provisions substantially overlap, each term can apply to conduct that the other does not. *See id*. at 1095. The key difference between the two is that gender identity within the ICRA's meaning provides additional protections for those who identify outside the male-female binary. For example, if an individual identifies as agender or non-binary, then they would fall outside the ICRA's protections for sex discrimination because they neither identify nor present as male or female, or as a man or woman. Similarly, those who identify and present as androgynous would not fall within the protections for sex discrimination based on gender stereotypes because they do not identify or present as masculine or feminine. Although overlap exists, even potentially significant overlap with regard to those who are transgender, this is not uncommon or out of the ordinary. *See Yates*, 135 S.Ct. at 1096.

Moreover, included terms within a statute can mean the same thing, in certain instances, and not result in surplusage. *Freeman v. Quicken Loans*, 566 U.S. 624, 635 (2012) (recognizing that the Court's interpretation of the relevant terms all mean the same thing, but this is not uncommon. "[T]he canon against surplusage merely favors that interpretation which *avoids* surplusage. It is impossible to imagine a 'portion' [] or even a 'split' that is not also a 'percentage'"); *Graham County Soil and Water Conservation District v. U.S.*, 559 U.S. 280, 288-89 (2010); *Yates*, 135 S.Ct. at 1095-96 ("Overlap--even significant overlap--abounds in the criminal law. This Court has never thought that of such ordinary stuff surplusage is made") (internal citations omitted); *R.G. & G.R.*, 884 F.3d at 578-79; *Hively*, 854 F.3d at 343-44; *Fabian*

v. Hospital of Central Connecticut, 172 F.Supp.3d 509, 527 n.12 (D. Conn. 2016) ("The fact that the Connecticut legislature added that language does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it"); *Florey v. City of Burlington*, 73 N.W.2d 770, 774 (Iowa 1955) ("The enumeration in present Code section 389.12, I.C.A. ('public highways, streets, avenues, alleys') illustrates the legislative habit (not unknown to lawyers) of overlapping enumeration. No one would seriously argue that avenues are not streets or that both are not public highways. By the same token the naming of both 'parks' and 'commons' in the cited legislative acts does not deny their essential relationship"). As the legislature intended the ICRA to be construed broadly, it merely exercised "belt-and-suspenders" caution in order to achieve its policy goal--to eliminate discrimination in Iowa. *Yates*, 135 S.Ct. at 1096. If the ICRA's term "sex" was narrowly interpreted by the courts, then gender identity would, in some ways, serve as a backstop. *Id*. The Court therefore finds that the overlap between the ICRA's terms "sex" and "gender identity" renders neither term redundant. For the Court to find otherwise would be to ignore what the legislature broadly intended when it prohibited nearly every type of discrimination in Iowa.

2. Whether the Verdict was Sustained by Sufficient Evidence.

Defendants allege the verdict is not supported by sufficient evidence because the evidence presented by Vroegh at trial focused only on the fact that he is transgender. Defendants' claim boils down to, again, their reliance on a distinction between terms "sex" and "gender identity" under the ICRA. *See* Def. Motion at 4. Defendants do not challenge the jury's verdict on Vroegh's gender identity discrimination claim.

The Court should grant a motion for a directed verdict, or a post-trial motion for judgment notwithstanding the verdict, if substantial evidence does not support each element of a claim. *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011). When considering a motion for a new trial, the Court may grant such a motion if the jury's verdict "is not sustained by sufficient evidence, or is contrary to law." Iowa R. Civ. Pro. 1.1004(6). "Substantial evidence" exists if "reasonable minds would accept the evidence as adequate to reach the same findings. When reasonable minds could differ on an issue, [a] directed verdict is improper and the case must go to the jury." *Pavone*, 801 N.W.2d at 487.

As in the case here, in order to prove sex discrimination under the ICRA based on the denial of using a restroom or locker room consistent with their identified sex or gender, a plaintiff must prove all of the following: (1) that they were an employee of the defendant; (2) that the defendant's denial constituted an adverse employment action; (3) that plaintiff's sex was a motivating factor in the defendant's decision to deny them the use of the restroom or locker room; (4) that the defendant's conduct in denying the plaintiff the use of the restroom or locker room was the proximate cause of the plaintiff's damages; and (5) plaintiff must prove the nature and extent of their damages. *Deboom*, 772 N.W.2d at 12; *Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n*, 672 N.W.2d 733, 741 n. 1 (Iowa 2003).

Speaking to the second element, an adverse employment action is "an action that detrimentally affects the terms, conditions, or privileges of employment. Changes in duties or working conditions that cause no materially significant disadvantage to the employees are not adverse employment actions." *Haskenhoff v. Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 587 (Iowa 2017) (quoting *Channon v. United Parcel Serv., Inc.*, 629 N.W.2d 835, 862 (Iowa 2001)). "'[A] wide variety of actions, some blatant and some subtle, can qualify' as adverse

employment actions." *Id*. (internal citations omitted). "Adverse action may include 'disciplinary demotion, termination, unjustified evaluations and reports, loss of normal work assignments, and extension of probationary period." *Id*. (quoting *Channon*, 629 N.W.2d at 862). Whether an employer took adverse employment action against a plaintiff depends on the facts of each case. *Id*. (internal citations omitted).

Access to the restroom while at work has been found to be a basic condition of employment. *Roberts v. Clark Cty. Sch. Dist.*, 215 F.Supp.3d 1001, 1015-16 (D. Nev. 2016); *Lusardi v. McHugh*, 2015 WL1607756, *9 (E.E.O.C. Apr. 1, 2015); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 607 (Maine 2014); *Baker v. John Morrell & Co.*, 220 F. Supp. 2d 1000, 1014 (N.D. Iowa 2002). An employer that denies a transgender employee to use the restroom consistent with their identified sex and gender is a significant harm constituting an adverse employment action. *Roberts*, 215 F.Supp.3d at 1015-16; *Stapp*, 995 F.Supp. at 1213; *Lusardi*, 2015 WL1607756 at *9, 15; *Doe*, 86 A.3d at 607; *Baker*, 220 F.Supp.2d at 1014. "[s]egregating bathroom access based on a person's transgender status constitutes a significant harm because it provides one set of terms and conditions of employment for transgender individuals and another set for male and female individuals." *Roberts*, 215 F.Supp.3d at 1016 (referencing *Lusardi*, 2015 WL1607756 at *9). Denying a transgender individual access to the restroom consistent with their sexual identity "publicly segregate[s] and isolate[s] [the employee] from other employees of [their] gender and communicate[s] that [they are] not equal to those other employees because [they] are transgender." *Lusardi*, 2015 WL1607756 at *12. This sends a message that those who are transgender are "unworthy of basic respect and dignity" because they are transgender. *Id*.

Regarding the third element, discrimination is a motivating factor for purposes of the ICRA "if an employee's status as a member of a protected class 'played a part' in the employer's

decision." *Haskenhoff*, 897 N.W.2d at 582 (citing *Deboom*, 772 N.W.2d at 12). However, the employer's discriminatory purpose need not be the *only* purpose for their actions. *Deboom*, 772 N.W.2d at 27-29. A plaintiff is not required to prove the employer's discrimination was the 'determining factor' spurring their conduct, which is a higher burden of proof, only that it 'played a part.'" *Id*. at 13.

In the instant case, Vroegh requested to use the men's restroom and locker room at ICIW. However, the facts as presented at trial established Defendants denied his request repeatedly. Vroegh also established at trial that he was threatened to be disciplined if he attempted to use the men's restrooms or locker rooms. Vroegh also provided evidence at trial that this denial by Defendants undermined his medical treatment, worsened his stress, depression, and anxiety, and made his transition more difficult.

Neither party denies Vroegh was an employee of Defendants. The first element is therefore not at issue. Likewise, as it relates to this claim, Defendants do not challenge in their Motion the sufficiency of the evidence under the fourth or fifth elements required to establish a prima facie case of sex discrimination. As such, those elements are not at issue before the Court.

As to the second element, the Court finds denying Vroegh access to the locker room and restroom that coincides with his identified gender constituted adverse employment action by Defendants because such a denial affects the terms, conditions, and privileges of employment. By publicly segregating Vroegh to another building which he did not work in, in turn causing Vroegh to take at times thirty-minutes to use the restroom, Defendants communicated he was not equal to other men because he is transgender. This segregation has qualified as adverse employment action before, and the Court finds this qualifies as adverse employment action now.

With regard to the third element, the Court finds Vroegh established at trial that he was discriminated against based on his sex, which was a motivating factor in denying him the right to use the men's restroom and locker room. The Court incorporates the analysis that the term "sex" for purposes of the ICRA includes those who are transgender. At trial, Vroegh provided evidence that Defendants' reason for denying him access to the men's restroom was "because [ICIW] has male staff too." Vroegh provided evidence at trial to prove Defendants' reason for denying him access was to not make other staff members uncomfortable. The Court finds that discrimination on the basis of Vroegh's transgender status was a motivating factor in Defendants deciding to deny Vroegh access to the men's facilities. The motivating factor here was Vroegh's status as a transgender male, which is protected under the ICRA's gender identity and sex discrimination protections from gender or sex stereotyping.

Overall, the Court finds substantial evidence existed at trial to reach the same findings as were just articulated. It was not in error to not direct a verdict in Defendants' favor, as reasonable minds could differ in how to rule on the issue. As such, the case should have been, and was, submitted to the jury. *Pavone*, 801 N.W.2d at 487.

3. Whether the Court Erred in Answering the Jury's Sole Question.

Defendants allege the Court's answer to the jury's only question was in error because it did not provide the narrow, binary-based definition of "sex" found within *Sommers*. Defendants' claim impliedly asserts they were prejudiced by the Court's response.

Procedurally, Iowa Rule of Civil Procedure 1.925 provides that, during jury deliberations, "the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record and any objections thereto shall be made in a motion for a new trial." In responding to the

jury, "the procedure utilized by the court in communicating with the jury must not compromise the integrity of the judicial system." *Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794, 796 (Iowa 1991). The following factors weigh against finding the integrity of the justice system is compromised: (1) the jury initiated the communication, thereby reducing the appearance of improper influence; (2) the Court responded in writing; (3) the communications were preserved in the record; and (4) the Court's responses were delivered to the whole jury. *Id*. at 796-97. Defendants must also prove they were materially prejudiced. *Id*. at 797.

Substantively, as a general rule, a jury question asked of the Court during deliberations is treated as a supplemental instruction. *Mumm v. Jennie Edmundson Memorial Hospital*, 924 N.W.2d 512, 518 (Iowa 2019). "Where the original instructions are inadequate, and the jury asks questions indicating their confusion and need for further explanation, the failure to give proper additional instructions may be reversible error." *Id*. (quoting 89 C.J.S. *Trial* § 974, at 433 (2012) (further citations omitted); *see also Brown v. Lyon*, 142 N.W.2d 536, 539 (1966) ("Supplemental instructions, of course, are as a general rule proper, and sometimes necessary and desirable."). Iowa's courts review challenges to supplemental answers to jury questions for abuse of discretion. *Id*. at 519 (referencing *McConnell v. Aluminum Co. of Am.*, 367 N.W.2d 245, 250 (Iowa 1985)). Defendants must therefore prove they were prejudiced by the Court's response to the jury's question. *Id*.; *McConnell*, 367 N.W.2d at 250 ("[appellants] have not shown they were prejudiced by the court's conduct [in responding to the jury questions]").

Defendants do not allege the Court violated the procedural requirements under Rule 1.925. Factually important here, during deliberations, the jury asked the following:

> 1. How are we defining sex vs. how are we defining gender identity? I.e. is sex=biological sex or sex on legal documents or should it [be] considered the same as gender identity in the instructions?

Over Defendants' objection, the Court responded as follows:

> 1. Sex is a term used to assign or identify an individual's gender. Gender identity is but one component of the concept of sex. Gender identity is an individual's sense of their own gender which may or may not comport with the sex or gender assigned to them at birth.

The Defendants are correct in recognizing this answer was a departure from *Sommers*, which would compel the Court to respond to the jury that "sex" means either male or female. However, the Court reincorporates its conclusions discussed above. As the Iowa Supreme Court and U.S. Supreme Court have found, "sex" includes protections from discrimination based on sex stereotypes, gender, and gender roles. This coincides with the Court's reply to the jury that "Sex is a term used to assign or identify . . . gender." The Court's response that "gender identity is but one component of the concept of sex" was likewise not improper for the same reason. To simply restate the logic of the Iowa and U.S. Supreme Courts: because the term "sex" includes gender, and sex discrimination covers discrimination based on gender and gender/sex roles or stereotypes, then gender and gender identity are components of "sex." The Court, as such, did not err when defining "sex" for the jury.

At this juncture, the Court finds it important to again incorporate its prior analysis that even though the terms "sex" and "gender identity" overlap, significantly or otherwise, the terms are not rendered superfluous. It follows then that the definition provided was not improper, nor did the Court's response render the terms superfluous. After all, those who are transgender can face sex discrimination *or* discrimination based on gender identity.

As to the second sentence, the Court's answer was almost identical to the definition provided by the legislature within the ICRA's text. Iowa Code section 216.2(10) defines "gender identity" as "a gender-related identity of a person, regardless of the person's assigned sex at birth."

The Court's response can be read as follows "gender identity is a person's gender-related identity, which may or may not comport with the person's assigned sex at birth." The Court simply used the term "individual" instead of "person" and "which may or may not comport with" instead of "regardless." These alterations to the definition were inconsequential at best. As such, the Court cannot conclude that Defendants were prejudiced. By incorporating its prior analysis and conclusions, the Court finds its answer to the jury's question was not in error or erroneous.

C. Defendants' Motion for New Trial: Whether the Court Erred in Denying Defendants' "Business Judgment" Jury Instruction.

Defendants claim the Court erred in denying their request to include the business judgment instruction in the final jury instructions. This allegation extends to the decisions of IDOC and/or Wachtendorf, as well as DAS in declining health insurance coverage for GCS. They claim the refusal to include the business judgment instruction amounts to legal error warranting a new trial because "an employer's harsh or unreasonable decision is not tantamount to discrimination." Defs. Motion at 6.

Iowa Rule of Civil Procedure 1.924 requires the Court to "instruct the jury as to the law applicable to all materials at issue in the case." "Parties are entitled to have their legal theories submitted to the jury when the instructions expressing those theories correctly state the law, have application to the case, and are not otherwise covered in other instructions." *Haltom v. Des Moines Area Regional Transit Auth.*, 2009 WL2960400, *1 (Iowa Ct. App. Sept. 2, 2009) (citing *Vasconez v. Mills*, 651 N.W.2d 48, 52 (Iowa 2002)). Instructions from the Court must convey the law in such a way that the jury has a "clear understanding of the issues it must decide" when they deliberate. *Burkhalter v. Burkhalter*, 841 N.W.2d 93, 105 (Iowa 2013) (internal citations omitted). "The district court must give a requested jury instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions." *Weyerhaeuser*

Co. v. Thermogas Co., 620 N.W.2d 819, 823 (Iowa 2000). In order for a party to succeed in proving a court abused its discretion by declining to give a proffered instruction, the party must prove (1) that the court erroneously denied the requested instruction, and (2) that denial caused prejudice. *State v. Plain*, 898 N.W.2d 801, 816 (Iowa 2017).

The business judgment instruction has been applied in employment discrimination cases. The instruction commonly provides that the jury "may not return a verdict for the Plaintiff just because you might disagree with [the defendant's] decision or believe it to be harsh or unreasonable." 8th Cir. Model Civil Jury Inst. 9.02 (2019). It "explains [to the jury] that an employer is entitled to make its own subjective personnel decisions for any reason that is not discriminatory." *Walker v. AT&T Tech.*, 995 F.2d 846, 849 (8th Cir. 1993). Iowa has adopted the following approach of the First Circuit Court of Appeals:

> The employer's stated legitimate reason must be reasonably articulated and non-discriminatory, but does not have to be a reason that the judge or jurors would act on or approve. Nor is an employer required to adopt the policy that will maximize the number of minorities, women, or older persons in his work force. An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination. (Citation omitted.)
>
> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if, indeed it is one. The [trier of fact] must understand that its focus is to be on the employer's motivation, however, and not on its business judgment. (Citation omitted.)

Woodbury Cty. v. Iowa Civil Rights Comm'n, 335 N.W.2d 161, 166 (Iowa 1983) (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)). The Iowa Supreme Court has also observed that complaints of discrimination "strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its [resources] in response to

shifting and competing market priorities." *Farmland Foods, Inc.*, 672 N.W.2d at 743 (quoting *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1244 (11th Cir. 2001)). An employer can develop ridiculous and irrational policies, so long as those policies are not applied in a discriminatory manner. *Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 n.3 (8th Cir. 1985).

The business judgment instruction thus conveys to the jury that the employer has discretion over its business and the decisions its makes, even if they were wrong. *Varlesi v. Wayne State Univ.*, 643 Fed. App'x 507, 518 (6th Cir. 2016). It allows an employer to determine who should be hired, fired, or promoted, as well as to decide work assignments or reassignments of its employees, in addition to allowing the employer to make more general personnel decisions. *Farmland Foods, Inc.*, 672 N.W.2d at 743; *Valline v. Murken*, 2003 WL21361344, *5 (Iowa Ct. App. June 13, 2003); *Neufeld v. Searle Laboratories,* 884 F.2d 335, 340 (8th Cir.1989). However, an employer has no right to discriminate against a person based on a protected characteristic under Title VII or the ICRA. *Varlesi*, 643 Fed. App'x at 518; *Woodbury Cty.*, 335 N.W.2d at 166 ("The employer's stated legitimate reason must be reasonably articulated and non-discriminatory.").

With regard to Defendants IDOC and Wachtendorf, both claim they are entitled to the business judgment exception because this is a "case where the jury could have easily disagreed with [their] decision [] or believed the decision to be hard or unreasonable." Defs. Motion at 6. However, neither IDOC nor Wachtendorf provide any factual, nondiscriminatory reason for denying Vroegh the right to use the men's facilities. To the contrary, the only reason proffered by either defendant was facially discriminatory, as it was based on balancing the interests of Vroegh against the interests of other employees who had previously expressed concerns.[12] IDOC and

[12] The Court finds Vroegh's analogy persuasive to illustrate the business judgment instruction's inapplicability. He provided, in his brief, the following:

Wachtendorf's reason for discriminating against Vroegh was not legitimate or nondiscriminatory, both of which they were required to provide. *Woodbury Cty.*, 335 N.W.2d at 166. While it is true the Court would be required to provide the business judgment instruction if they had a legitimate nondiscriminatory reason for prohibiting Vroegh from using the men's facilities, this is not the state of affairs before the Court now. "Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices." *Schroer v. Billington*, 577 F.Supp.2d 293, 302 (D.D.C. 2008). Had the Court actually provided the instruction as Defendants wanted, it would have been an incorrect statement of the law. Iowa R. Civ. Pro. 1.924 (2020). The Court therefore finds defendants IDOC and Wachtendorf were not entitled to the business judgment jury instruction at trial.

Likewise, the Court finds the same logic applies to DAS. The Court adopts the Iowa Supreme Court's reasoning in *Good v. Iowa Department of Human Services* as follows:

> The record does not support the DHS's position that rule 441—78.1(4) is nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of "cosmetic, reconstructive, or plastic surgery" that is "performed primarily for psychological purposes." The DHS expressly denied [petitioners] coverage for their surgical procedures because they were "related to transsexualism ... [or] gender identity disorders" and "for the purpose of sex reassignment." Moreover, the rule authorizes payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes—e.g., "[r]evision of disfiguring and extensive scars resulting from neoplastic surgery" and "[c]orrection of a congenital anomaly." Yet, it prohibits coverage for this same procedure if a transgender individual.
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> T[]he concerns of others about treating a co-worker in a non-discriminatory manner – whether it be because of race, sex, disability, gender identity, or any other category protected under the ICRA –will never justify discrimination. If it could, then employers would still be permitted to hire only men because they did not feel comfortable working with women, or segregating black employees to different parts of the company due to white workers' "discomfort" of being around them. This is precisely the mindset that the ICRA and other civil rights acts were enacted to combat.

Vroegh's Resistance at 12.

924 N.W.2d at 862 (internal citations omitted). DAS alleges it was entitled to the business judgment instruction because "the jury could have easily . . . disagreed with DAS or believed the decision to include gender reassignment surgery as one of the many non-covered items in a health plan to be harsh or unreasonable." Defs. Motion at 6. However, the Court finds the record does not support a finding that DAS had a legitimate nondiscriminatory purpose for denying Vroegh coverage for GCS. Because it lacked a legitimate, nondiscriminatory reason, DAS was not entitled to the business judgment jury instruction. *Good*, 924 N.W.2d at 862; *Woodbury Cty.*, 335 N.W.2d at 166. To have included the instruction would have been an incorrect statement of the law. Iowa R. Civ. Pro. 1.924 (2020).

To summarize, the Court finds that including the business judgment instruction would have resulted in the Court providing an incorrect statement of the law to the jury. Defendants provided no evidence of a legitimate nondiscriminatory purpose for denying Vroegh access to the men's facilities or the right to insurance coverage for GCS. Even applying the Eighth Circuit standard, the Court finds Defendants are not entitled to the business judgment instruction because they applied their policy prohibiting Vroegh from using the men's facilities and from insurance coverage in a discriminatory manner. *Smith*, 770 F.2d 723 n.3.

D. Defendants' Motion for New Trial: Whether the Court Erred in Excluding Evidence of Plaintiff's Character for Untruthfulness and Motive.

Defendants allege the Court's exclusion of evidence that purportedly speaks to Vroegh's character for untruthfulness and to his motive in bringing this lawsuit constitutes reversible error. For the reasons stated below, the Court finds these arguments have no merit.

1. Character Evidence: Vroegh's Character for untruthfulness.

Generally, evidence of a person's character is inadmissible to "prove that on a particular occasion a person acted in accordance with the character or trait." Iowa R. Evid. 5.404(a)(1) (2020). Under Iowa Rule of Evidence 5.404(b), evidence of prior bad acts is "not admissible to prove the character of a person in order to show that person acted in conformity therewith." Character evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id*.

The Court uses a three-step analysis in determining whether evidence of prior bad acts should be admitted. *State v. Sullivan,* 679 N.W.2d 19, 25 (Iowa 2004). First, the Court determines if the evidence was relevant and material to a legitimate, disputed, factual issue in the case before it. *State v. Putman*, 848 N.W.2d 1, 8 (Iowa 2014). Second, there must be "clear proof the individual against whom the evidence is proffered committed the bad act or crime." *Id*. at 9. Third, the Court is required to determine if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the party it is being offered against. *Id*. If the probative value of the evidence is outweighed by the danger of prejudice, then the evidence must be excluded. *Sullivan*, 679 N.W.2d at 25; Iowa R. Evid. 5.402 (2020).

Evidence is relevant is it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401 (2020). Iowa's conventional test for relevancy is "whether a reasonable [person] might believe the probability of the truth of the consequential fact to be different if [the person] knew of the proffered evidence." *Putman*, 848 N.W.2d at 9 (citing *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988)). If evidence is irrelevant, then it is inadmissible. *Id*.; Iowa R. Evid. 5.402 (2020).

Iowa Rule of Evidence 5.404(b) grants an exception to the general bar against introducing character evidence for witnesses in civil cases under Iowa Rules of Evidence 5.607 to 5.609. Rule 5.607 provides that any party may attack a witness's credibility. Rule 5.608 states that "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to the following limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness." Rule 5.609 governs impeachment of a witness by evidence of a criminal conviction, which is inapplicable to this case.

As Defendants hang their hat on 5.608(b), the Court will focus its discussion accordingly. Rule 5.608(b) is narrow in scope. *State v. Greene*, 592 N.W.2d 24, 28–29 (Iowa 1999). This part of the rule "permits cross-examination of a witness concerning a specific instance of conduct by the witness [relevant to their character for truthfulness or untruthfulness]; it does not permit such conduct to be proved by extrinsic evidence." *Id*. "The nature and scope of cross-examination is governed by the sound discretion of the trial court." *State v. Parker*, 747 N.W.2d 196, 207 (Iowa 2008) (citing *State v. Martin*, 385 N.W.2d 549, 552 (Iowa 1986). Evidence attempting to be brought into a trial under Rule 5.608(b) is still subject to restraint by the other rules of evidence, including Rule 5.401 (relevance), 5.402 (irrelevant evidence is inadmissible), and 5.403 (providing reasons to exclude prima facie relevant evidence). *Putman*, 848 N.W.2d at 8-9; *see also United States v. Beal*, 430 F.3d 950, 956 (8th Cir. 2005). An appellate court reviews evidentiary rulings by a trial court for abuse of discretion. *Parker*, 747 N.W.2d at 203. A trial court abuses its discretion when it "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001) (internal citations and quotations omitted).

At trial, Defendants sought to introduce that Vroegh was terminated for sending confidential medical records of an inmate to an unauthorized, outside party in violation of ICIW rules. Vroegh claimed he did not send the medical records or, in the alternative, that the records were sent by mistake after being placed in the wrong envelope. Vroegh's termination was upheld at arbitration. Defendants claim this evidence is relevant because Vroegh's wrongful conduct occurred at his place of employment and during the investigation Vroegh denied sending the documents. Defendants allege Vroegh's actions qualify as an act of dishonesty, deceit, or fraud that speak to his character for untruthfulness. This is the only instance of alleged dishonesty that Defendants sought to admit under 5.608(b). Somehow, though, Defendants equate this one act of alleged dishonesty as being indicative of *all* of his actions as an employee. Vroegh continues to deny that he was in any way untruthful. To support his denial of dishonesty, Vroegh included his Unemployment Insurance Decision, which concluded Defendants "did not furnish sufficient evidence to show misconduct." Ex. A, attached to Vroegh's Response to Defs. Resist. to Vroegh's Motion in Limine (Filed Jan. 30, 2019).

Notably, Defendants do not address the balance of the probative value in introducing Vroegh's statement that he did not send the records against its potential for prejudice. Defendants have also not addressed why the information is probative to Vroegh's discrimination claims. This leaves the Court asking what value any evidence of Vroegh's alleged dishonesty surrounding his termination would serve in making any fact at issue more or less probable than it would be without the evidence in this discrimination case. Without a proffered reason by Defendants, the Court is left concluding as it did at trial that this evidence is irrelevant to Vroegh's sex and gender identity discrimination claims. Vroegh did not allege he was wrongfully terminated. Vroegh instead claimed he was discriminated against by Defendants denying him access to the men's facilities

that comport with his identified gender. Defendants do not dispute Vroegh was prohibited access to the men's locker rooms and restrooms, nor do they deny their reasons for refusing him the right to use those facilities. The Court thus finds as it did at trial, that any inquiry into Vroegh's termination and related alleged dishonesty is irrelevant to this case.

Further, even if the evidence were relevant to this case, the Court concludes that the 5.403 balancing test leads to the conclusion that an inquiry into Vroegh's termination and disputed act of dishonesty weighs against the admission of such evidence. First, whatever probative value questioning Vroegh about sending the report might have--that is, if Vroegh lied about sending the records against ICIW rules, in turn being a specific act speaking to his character for untruthfulness that clouded his employment with ICIW--that probative value is minimal and very attenuated in light of the disagreement between the Iowa Public Employment Relations Board (PERB) decision and the Iowa Workforce Development (IWD) Unemployment Insurance Decision. Simply put, whether Vroegh was dishonest is disputed because PERB found Vroegh was rightly terminated and actually sent the records against policy, but IWD found there was insufficient proof that Vroegh even improperly sent the records at all. Thus, on the other side of the balance, there is a substantial risk for prejudice that would result from Defendants' inquiry into Vroegh's termination. Specifically, as the Court found at trial, the nature and circumstances of this alleged falsehood could easily distract the jury from its task of deciding a discrimination case without adding any real probative information to their decision of whether Vroegh is credible following his testimony. Indeed, allowing this inquiry could rapidly devolve into a sideshow concerning what actually happened, what statements Vroegh made, and even whether Vroegh actually made dishonest statements. This would cause an unnecessary delay in the trial in an attempt to establish facts that have little-to-no probative value. Thus, the Court correctly denied admitting evidence regarding

Vroegh's termination and any alleged act of untruthfulness under Iowa Rules of Evidence 5.401, 5.402, and 5.403.

Likewise, Defendants were not prejudiced by the Court denying their request to refer to Vroegh's "end of employment" as "unrelated" to the issues of the case. Allowing "unrelated" to be added could have resulted in the jury wondering about Vroegh's termination when his firing had nothing to do with this case. At no time during the trial was either party permitted to suggest Vroegh quit because Defendants denied him access to the men's facilities. Nor were the parties permitted to imply that he left his employment because of DAS's denial of insurance coverage for GCS. This was because any issues surrounding Vroegh's termination were irrelevant to the facts that were before the jury. Moreover, Defendants agreed to this language at the pretrial hearing and did not object at any point during the trial on these grounds. Without ruling on Defendants' potential waiver, the Court finds it did not err in limiting references to Vroegh no longer working for Defendants to saying he "left employment." The Court additionally finds Defendants were not prejudiced by using the term "end of employment." This decision was proper under Iowa Rules of Evidence 5.401 and 5.403.

2. Motive.

Next, Defendants claim the exclusion of Exhibit S and any related testimony regarding Vroegh's motive for bringing this suit and in suing Wachtendorf substantially prejudiced them. Defendants cite no law from any court to support this allegation. Nonetheless, the Court will address this claim.

It is a well-established principle of law that a plaintiff's motive in bringing a lawsuit is otherwise immaterial to resolving the merits of a dispute. *See Kobashigawa v. Silva*, 300 P.3d 579, 599-600 (Hawai'i 2013) (citing *Dickerman v. N. Trust Co.,* 176 U.S. 181, 190 (1900) ("If the law

concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits."); *Karim v. Gunn,* 999 A.2d 888, 890 (D.C.2010) ("The motive of a party in bringing an action generally is immaterial to the question whether the action may be maintained."); *Somers v. AAA Temp. Servs.,* 284 N.E.2d 462, 465 (Ill. Ct. App. 1972) ("It is generally accepted that where the plaintiff asserts a valid cause of action, [the plaintiff's] motive in bringing the action is immaterial."). This remains true, provided the plaintiff has a valid cause of action. *Kobashigawa*, 300 P.3d at 600. Of course, this presumption is because a plaintiff's motive has nothing to do with whether a defendant has violated the law. *Tallman v. Freedman Anselma Lindberg, L.L.C.*, 2013 WL2631754, *3 (C.D. Ill. June 12, 2013); *Lee v. Kucker & Bruh, LLP,* 2013 WL 680929, at *2 (S.D.N.Y. 2013). A plaintiff's motive can be inquired into if a defendant can show the suit was brought in bad faith. *Piontek v. I.C. System,* 2009 WL 1044596, at * 1 (M.D. Pa. 2009); *Bynum v. Cavalry Portfolis Serv., L .L.C.,* 2006 WL 897712, at *2 (N.D. Okla. 2006). However, baseless lawsuits or those based on ulterior motives have no place in court. *Seltzer v. Morton*, 154 P.3d 561, 609 (Montana 2007); 1 Am. Jur. 2d Actions § 42.

A plaintiff who brings a lawsuit in bad faith or with ulterior motives can constitute an abuse of process if proven by the defendant. *Froning & Deppe, Inc. v. South Story Bank & Trust Co.*, 327 N.W.2d 214, 215 (Iowa 1982). An "[a]buse of process is the 'use of the legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed." *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001) (quoting *Fuller v. Local Union No. 106 of United Bhd. of Carpenters & Joiners of Am.*, 567 N.W.2d 419, 421 (Iowa 1997)). An action for abuse of process can be brought even if the plaintiff has cause to bring their lawsuit if the primary purpose of the action was improper. *Palmer v. Tandem Mgmt. Servs., Inc.*, 505 N.W.2d

813, 817 (Iowa 1993). To prove an abuse of process, a party must prove that the plaintiff "used the legal process *primarily* for an impermissible or illegal motive." *Wilson v. Hayes*, 464 N.W.2d 250, 266 (Iowa 1990). Put a different way, "proof of an ulterior motive for the plaintiff's suit, standing alone, is not enough. Rather, a prerequisite for recovery is evidence that the person committed some act in the use of process that was not proper in the regular prosecution of the proceeding." *Jensen v. Barlas*, 438 F.Supp.2d 988, 1002-03 (N.D. Iowa 2006) (internal citations and quotations omitted). A plaintiff's intent to financially benefit from bringing a civil suit, as the primary remedy for a civil action is monetary damages, does not in itself constitute an abuse of process. *See Reis v. Walker*, 491 F.3d 868, 871 (8th Cir. 2007). Moreover, "there is no abuse of process when the action is filed to intimidate and embarrass a defendant knowing there is no entitlement to recover the full amount of damages sought. Proof of an improper motive by the person filing the lawsuit for even a malicious purpose does not satisfy [the requirement] that the legal process was used in an improper manner." *Palmer*, 505 N.W.2d at 817 (citing *Grell v. Poulsen*, 389 N.W.2d 661, 664 (Iowa 1986)). Thus, the courts take "a very restrictive view" when considering if a plaintiff used the legal process improperly. *Id*. (citing *Wilson v. Hayes*, 464 N.W.2d 250, 266-67 (Iowa 1990)).

On very rare occasions, other courts have permitted "a plaintiff's motive for bringing suit to be considered to demonstrate bias and undermine the credibility of a plaintiff who testifies—when the evidence demonstrates that the plaintiff brought the lawsuit for an ulterior purpose." *Medeiros v. Choy*, 418 P.3d 574, 582 (Hawai'i 2018); *see also Samsung Elecs. Co. v. NVIDIA Corp.,* 2016 WL 754547, at *2 (E.D. Va. Feb. 24, 2016); *Montoya v. Village of Cuba*, 2013 WL6504291, *17 (D.N.M. Nov. 30, 2013). However, in those rare occasions, the defendant must

first demonstrate the cause of action was brought by the plaintiff for an improper ulterior purpose. *Choy*, 418 P.3d at 582-83.

Here, Defendants do not assert Vroegh abused the legal process in bringing his claims. Defendants do not even adequately claim Vroegh brought this case for an ulterior motive. Nor do they challenge that this lawsuit is properly before the Court now. Instead, Defendants claim they were prejudiced by the exclusion of evidence of Vroegh's motive generally, especially by suing Wachtendorf in her individual capacity. Specifically, Defendants wanted to introduce highly prejudicial statements made by Vroegh about Wachtendorf, as illustrated in Exhibit S. Defendants also wanted to introduce evidence of Vroegh's motive to financially gain from the lawsuit, including his intent to use the damages award to visit his friend in Florida. The Court finds all of the facts regarding Vroegh's motive in bringing this case immaterial to resolving the dispute on its merits. Vroegh's animosity towards Wachtendorf is irrelevant to whether he was discriminated against while employed by Defendants, as is Vroegh's intent to use his damages award to visit his friend in Florida. The Court therefore finds it properly excluded evidence of Vroegh's motive in bringing this case. This action was neither meritless nor does the Court find the legal process was used in an improper manner. To the extent Defendants wished to use the evidence of Vroegh's motive to prove bias and attack his credibility, the Court finds that Defendants have not established this case was brought with an ulterior motive. The Court thus finds evidence of Vroegh's motive is irrelevant and any probative value of such evidence is substantially outweighed by its prejudice under Iowa Rule of Evidence 5.403. Such evidence was properly excluded in the Court's discretion.

As further proof that Defendants were not prejudiced by this exclusion, the Court recognizes that it did permit Defendants to cross-examine Vroegh about his Facebook comments

regarding Wachtendorf, including his statements that "she is gonna pay tomorrow," "I am sure Patti is shitting herself," and "[I] Wish I could have seen her face." *See* Ex. T. Vroegh admitted he made these statements. Thus, any additional comments made by Vroegh about Wachtendorf would have been cumulative and exclusion was likewise proper under Rule 5.403.

E. Defendants' Motion for New Trial: Errors of Law in the Jury Instructions.

Defendants allege they are entitled to a new trial because the Court committed legal errors that substantially prejudiced them with respect to multiple jury instructions, including instructions 10, 11, 12, 13, 15, 16, 17, and 21. The Court will address Defendants' contentions in-turn after providing a summary of the law that is applicable to all of their claims.

"Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial." *State v. Johnson*, 481 N.W.2d 541, 542 (Iowa 1991) (citing *State v. Freeman*, 267 N.W.2d 69, 71 (Iowa 1978)). "The district court has a duty to instruct a jury on all legal issues presented in a case." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 265-66 (Iowa 2000) (citing *State v. Herndon*, 257 N.W.2d 19, 22 (Iowa 1977); *Kuehn v. Jenkins*, 100 N.W.2d 610, 617-18 (Iowa 1960)). The Iowa Supreme Court has provided "that objections to jury instructions must specify the matter objected to and the grounds of objection." *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 703 (Iowa 2013) (citing Iowa R. Civ. Pro. 1.924). "The purpose of the rule is to enable trial counsel to correct any errors in the instructions before the court submits the case to the jury." *Pavone v. Kirke*, 801 N.W.2d 477, 496 (Iowa 2011). As such, "[o]bjections must be specific enough to put the trial court on notice of the basis of the complaint so the court may appropriately correct any errors before placing the case in the hands of the jury." *Mitchell*, 832 N.W.2d at 703.

If the instructions submitted to the jury contain errors of law that materially affect the substantial rights of a party, then a new trial should be granted. Iowa R. Civ. Pro. 1.1004(8). "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson*, 620 N.W.2d at 268 (citing 88 C.J.S. *Trials* § 371, at 950). "When an instruction is confusing or conflicting, we are generally required to reverse." *McElroy v. State*, 637 N.W.2d 488, 500 (Iowa 2001) (internal citations omitted).

However, "Jury instructions are to be considered as a whole, not in isolation." *Id*. (citing *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 536 (Iowa 1999)). Jury instructions are not required to contain any specific language, as long as the instructions are a correct statement of the law and are supported by substantial evidence. *State v. Schuler*, 774 N.W.2d 294, 298 (Iowa 2009) (stating that jury instructions do not need to "contain or mirror the precise language of the applicable statute."). "[W]ords used in a jury instruction need not be defined 'if they are of ordinary usage and are generally understood.'" *State v. Thompson*, 570 N.W.2d 765, 768 (Iowa 1997) (quoting *State v. Weiss*, 528 N.W.2d 519, 520 (Iowa 1995)). "A word's meaning can be determined by its use in context" *Id*. (internal citation omitted). As a general rule, a jury question asked of the Court during deliberations is treated as a supplemental instruction. *Mumm*, 924 N.W.2d at 518. "The court is required to give a party's requested instruction so long as it 'states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions.'" *State v. Becker*, 818 N.W.2d 135, 142 (Iowa 2012), *overruled on other grounds*, *Alcala v. Marriott Intern., Inc.*, 880 N.W.2d 699 (Iowa 2016) (quoting *State v. Marin*, 788 N.W.2d 833, 837 (Iowa 2010)). However, the court is not required to give requested instructions if such a topic is already covered. *Id*. (citing *State v. Veal*, 564 N.W.2d 797, 812 (Iowa

1997), *overruled in part on other grounds by State v. Hallum*, 585 N.W.2d 249, 253 (Iowa 1998), *vacated on other grounds,* 527 U.S. 1001 (1999)).

1. Instruction 10, 11, and 16.

Defendants objected to Jury Instructions 10 and 11 based on the inclusion of the "motivating factor" standard, rather than "because of" language found in the ICRA. They also objected to the last sentence of Instructions 10 and 11 based on the inclusion of pretext, claiming such language was an incorrect statement of law that lowered Vroegh's burden of proof. Defendants' objection to the instructional language pertaining to pretext was raised as to Instruction 16, as well. These objections establish the only bases Defendants raise in reference to Instructions 10, 11, and 16. In place of Instructions 10 and 11 Defendants requested Defendants Proposed Instruction No. 13.[13]

Instruction 10, as provided to the jury, stated as follows:

> Instruction No. 10
> Sex--Restroom/Locker Room Use - Elements.
>
> To establish his claim of sex discrimination against the Iowa Department of Corrections and/or Patti Wachtendorf based on the denial of his request to use the

[13] State Defendants' Proposed Instruction No. 13 states as follows:

> In order to recover on his intentional [sex and/or] gender identity discrimination claim for the men's restrooms/locker room accommodation, Plaintiff must prove the following by a preponderance of the evidence:
>
> First, Iowa Department of Corrections and/or Patti Wachtendorf unreasonably denied Plaintiff's request to use the men's restroom and locker room; and
>
> Second, the denial constituted an adverse employment action; and
>
> Third, Iowa Department of Corrections and/or Patti Wachtendorf did so with an intent and motive to violate Plaintiff's rights on the basis of his [sex and/or] gender identity.
>
> As used in this Instruction, "adverse employment action" means negatively impact a term or condition of employment.
>
> If Plaintiff has failed to prove all of the above elements, your verdict must be for the Iowa Department of Corrections and/or Patti Wachtendorf and you need not proceed further in considering this claim. The discrimination must be intentional and the focus is on Iowa Department of Corrections and/or Patti Wachtendorf's motive. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment between Plaintiff and similarly situated employees.

men's restrooms and lock room consistent with his sex, Vroegh must prove the following:

1. Vroegh was an employee of the Iowa Department of Corrections;
2. Defendants denied Vroegh the use of the men's restroom and/or locker room;
3. Vroegh's sex was a motivating factor in Defendants' decision to deny him the use of the men's restrooms and/or locker room;
4. Defendants' conduct in denying Vroegh the use of the men's restrooms and/or locker room was a proximate cause of damage to Vroegh; and
5. The nature and extent of his damages.

If any of the above elements have not been proved by the preponderance of the evidence, your verdict must be for the defendants Iowa Department of Corrections and/or Patti Wachtendorf and you need not proceed further in considering this claim. You may find that the plaintiff's sex was a motivating factor in the defendants' decision if it has been proved by the preponderance of the evidence that the defendants' stated reasons for their decision are a pretext to hide sex discrimination.

Instructions 10 and 11 are identical, except Instruction 11 references "gender identity" instead of "sex."

The Court finds Defendants' assertion that "motivating factor" was not the proper standard in this case lacks merit. The ICRA does not require a plaintiff to prove that the alleged discrimination by employer was the "determining factor" or a "significant factor" of the adverse employment action based on their protected status. *DeBoom*, 772 N.W.2d at 13. A determining factor "tips the scales decisively one way or the other, even if it is not the predominant reason behind the employer's decision." *Id.* (finding ICRA claims do not require this higher burden of proof derived from tortious discharge law) (referencing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 301-02 (Iowa 1998)). Under the ICRA, a plaintiff only needs to demonstrate the adverse employment action taken by their employer gave rise "to an 'inference of discrimination' and his or her status as a member of a protected class was a determining factor" in the employer's

discriminatory conduct. *Hawkins*, 929 N.W.2d at 270 (quoting *DeBoom*, 772 N.W.2d at 13. The Iowa Supreme Court has clarified "that the term *a determining factor* is better stated as *a motivating factor* because *a determining factor* indicates a higher burden for the plaintiff, which 'is not required by either the Iowa Civil Rights Act or case law.'" *Id*. (quoting *DeBoom*, 772 N.W.2d at 13-14) (emphasis in original). Thus, a plaintiff proves their employer's discrimination is a motivating factor "if an employee's status as a member of a protected class 'played a part' in the employer's decision." *Haskenhoff*, 897 N.W.2d at 582 (citing *Deboom*, 772 N.W.2d at 12). Likewise, our Supreme Court has interpreted the ICRA's "because of" language requires a plaintiff to show their protected status was a motivating factor. *Id*. Thus, Defendants are incorrect in claiming that the inclusion of "motivating factor" within Instructions 10 and 11 constitutes legal error under Iowa law.

Next, Defendants allege the last sentence regarding pretext was an incorrect statement of law. The language regarding pretext is verbatim from the Eighth Circuit Court of Appeals Model Civil Jury Instruction 5.01. "A pretext instruction states a jury may infer intentional discrimination if it disbelieves the employer's asserted reasons for terminating the employee." *DeBoom*, 772 N.W.2d at 9. As the Iowa Supreme Court has recognized, the language of the pretext instruction is a correct statement of law. *Id*. (internal citations omitted). "A pretext instruction is necessary because discrimination cases are difficult to prove. The Supreme Court has acknowledged the issue before the fact finder in a discrimination case is both sensitive and difficult, and that [t]here will seldom be eyewitness testimony as to the employer's mental processes." *Id*. at 10 (internal citations and quotations omitted). Further, our Supreme Court has held that a pretext instruction "is required where [] a rational finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a

discriminatory purpose.'" *Id*. (quoting *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002)). Based on the state of Iowa law, the pretext instruction was both necessary in this case and a correct statement of the law. Thus, the Court finds the pretext language found in Instructions 10, 11, and 16 was proper and no legal error existed. Therefore, Defendants were not prejudiced by the inclusion of the pretext language.

2. Instruction 12.

Defendants claim Instruction 12 fails to follow the requirements found in Iowa Code section 216.6A(2)(a). Defendants further object to the instruction because it did not include a definition of "discriminated." Last, Defendants object to the inclusion of the pretext language for the same reasons recognized above.

Instruction 12, as submitted to the jury, states as follows:

Instruction No. 12
Sex and/or Gender Identity -- Insurance Benefits --State Defendants - Elements.

In order to prove his claim of sex and/or gender identity discrimination against the Iowa Department of Corrections and/or Iowa Department of Administrative Services based on the provision or administration of employee benefits, Vroegh must prove the following elements:

1. Vroegh was an employee of the Iowa Department of Corrections;
2. Defendants discriminated against the plaintiff in the provision or administration of employee benefits on the basis of sex and/or gender identity;
3. Defendants' conduct was a proximate cause of damage to Vroegh; and
4. The nature and extent of his damages.

If any of the above elements have not been proved by the preponderance of the evidence, your verdict must be for the defendants and you need not proceed further in considering this claim. You may find that the plaintiff's sex and/or gender identity was a motivating factor in the defendants' action if it has been proved by the preponderance of the evidence that the defendants' stated reasons for their actions are a pretext to hide sex and/or gender identity discrimination.

First, the Court finds the absence of a definition for "discriminated" does not constitute legal error. "Jury instructions are to be considered as a whole, not in isolation." *Anderson*, 620 N.W.2d at 268 (internal citations omitted). Jury instructions are not required to contain any specific language, as long as the instructions are a correct statement of the law and are supported by substantial evidence. *Schuler*, 774 N.W.2d at 298 (stating that jury instructions do not need to "contain or mirror the precise language of the applicable statute."). "[W]ords used in a jury instruction need not be defined if they are of ordinary usage and are generally understood." *Thompson*, 570 N.W.2d at 768 (internal quotations and citations omitted). "A word's meaning can be determined by its use in context" *Id*. (internal citation omitted). Although the term "discriminated" was not defined in the Instruction, the term was used consistent with its ordinary meaning as it is generally understood. Further, as context matters, the term "discriminated" was explained within the context of Vroegh's claims in the statement of the case and followed the marshalling instructions for sex and gender identity discrimination. As such, the Court finds including a definition of "discriminated" would be unnecessary, as the jury understood what the term meant based on its ordinary meaning and within the context of the claims before it.

Importantly, Defendants proffered Instruction 14 sets forth the elements correctly if Vroegh was bringing a discriminatory pay action under the ICRA, which he did not. Instead, Vroegh brought a claim for discrimination based on an employee benefit. Vroegh correctly stated that had the Court used Defendants Proposed Instruction 14, it would likely have confused the jury if included. Based on these facts, the Court finds Instruction 12 was a correct statement of the law and was not legally erroneous. Defendants were therefore not prejudiced by Instruction 12's language or its inclusion.

The Court hereby incorporates as it relates to Instruction 12 the pretext and burden of proof analysis discussed above with regard to Instructions 10, 11, and 16. The instruction properly states Vroegh's burden of proof and the pretext instruction was proper.

3. Instruction 13.

Defendants next claim Instruction 13 constituted legal error because it was confusing and implied that Defendants had to prove their affirmative defense before Vroegh satisfied his initial burden of proof. Instead, Defendants claim the Court should have used Defendants Proposed Jury Instruction 16. However, Defendants' Instruction 16 pertains to a discriminatory pay action, which was not one of Vroegh's claims. Again, including such an instruction would be confusing to the jury, for pay discrimination was not at issue in this case.

Even so, it is unclear to the Court what the Defendants claim was confusing from the instruction provided. Instruction 13 states:

Instruction 13.

> If you find in favor of the Plaintiff under Instruction No. 12 then you must answer the following question in the verdict forms: Has the Department of Administrative Services and/or Iowa Department of Corrections proved by a preponderance of the evidence that the difference in health benefits was the result of a factor other than sex or gender identity?

The Court cannot see how the instruction is confusing. It states that if you found that Vroegh proved that DAS discriminatorily denied insurance coverage for GCS, then the jury must answer if Defendants proved their affirmative defense. Grammatically and logically, Instruction 13 requires Vroegh prove his discrimination claim against DAS first before the jury decides on if Defendants proved their affirmative defense. This is not confusing, nor did it constitute legal error.

4. Instruction 15.

Defendants next allege that Instruction 15 was legal error because it inappropriately lowered Vroegh's required causation standard. Instead, Defendants claim that defining "motivating factor" to only require an employer's discriminatory conduct "played a part" in their decision improperly lowered Vroegh's burden of proof.

Instruction 15, as provided to the jury, stated as follows:

Instruction No. 15.

> As used in these Instructions, the plaintiff's sex, gender identity, or both his sex and gender identity was a "motivating factor" if that factor played a part in the defendants' actions toward the plaintiff. However, the plaintiff's sex, gender identity, or both his sex and gender identity need not have been the only reason for the defendants' actions.

Defendants remain incorrect in their interpretation and definition of the ICRA's "motivating factor" standard. The majority in *Haskenhoff*, rather than the concurrence which Defendants rely on, stated "In *DeBoom*, we emphasized the causation test for status-based discrimination under the ICRA was not '*the* determining factor' test but rather '*a* determining factor' test. We further noted it was sufficient to show that status-based discrimination '*played a part in the Defendant's later actions toward Plaintiff.*'" 897 N.W.2d at 633 (citing *DeBoom*, 772 N.W.2d at 13) (emphasis in the original) (JJ. Waterman, Mansfield, Zager, Appel, Wiggins, & Hecht joining in finding this to be the correct standard). The Court further recognized that it is "sufficient to show that status-based discrimination 'played a part in the Defendant's later actions toward Plaintiff.'" *Id*.

As such, Instruction 15 is an accurate statement of the law in Iowa and no legal error or prejudice resulted from it being given to the jury. Moreover, the last sentence of Instruction 15 accurately states the law. *See DeBoom*, 772 N.W.2d at 13, 27-29.

5. Instruction 17.

Defendants claim Instruction 17 placed an unfair emphasis on "complaints from other employees" or belief that "others may feel uncomfortable" as a basis for the Defendants' decision to deny Vroegh access to the men's facilities. In so claiming, Defendants argue that by including Instruction 17 and excluding their requested business judgment instruction, the Court effectively prevented IDOC and Wachtendorf from asserting a defense.

Defendants, in their Motion, do not contend Instruction 17 is an inaccurate statement of the law and do not claim offering it was in legal error. Defendants also offer no jury instruction to take Instruction 17's place. Defendants state their reason in denying Vroegh access to the men's facilities "was that they were trying to balance Plaintiff's request with staff concerns." Defs. Motion at 17. However, the Instruction provided to the jury at issue here provides as follows:

Instruction 17.

> Employers may not discriminate against an employee based on the employee's sex or gender identity because it has received complaints from other employees or believes that others may be uncomfortable with the employee based on his sex or gender identity.

Instruction 17 is an accurate statement of the law. "Deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices." *Schroer,* 577 F.Supp.2d at 302; *see Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971); *Bradley v. Pizzaco of Neb., Inc.*, 7 F.3d 795, 799 (8th Cir. 1993); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1270 (8th Cir.1981); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981); *see also* Iowa Code § 216.6 (enumerating no exception to the ICRA's prohibition on employment discrimination based on protected status). All parties agree the Instruction accurately states the law as it applies to this case. "'Iowa law requires a court to give a requested

jury instruction if it correctly states the applicable law and is not embodied in other instructions.'" *Alcala*, 880 N.W.2d at 707 (quoting *Sonnek v. Warren,* 522 N.W.2d 45, 47 (Iowa 1994); citing *Weyerhaeuser Co.,* 620 N.W.2d at 823–24, and *Herbst v. State,* 616 N.W.2d 582, 585 (Iowa 2000)). "The verb 'require' is mandatory and leaves no room for trial court discretion." *Id*. As Vroegh requested Instruction 17 and it is an accurate statement of the applicable law not embodied in other instructions, the Court was required to offer the Instruction. There was no room for discretion to deny the Instruction.

Defendants couple their challenge to Instruction 17 with their challenge to the exclusion of the business judgment jury instruction. However, as previously discussed, the business judgment jury instruction would have been an inaccurate statement of the law. Iowa R. Civ. Pro. 1.924 (2020). To be applicable, Defendants were required to offer a legitimate nondiscriminatory purpose for their conduct before they were entitled to the business judgment instruction. *Woodbury Cty.*, 335 N.W.2d at 166. Defendants did not offer a legitimate, nondiscriminatory purpose to the Court or to the jury. Indeed, the only justification provided by Defendants for their discriminatory conduct was that Vroegh's use of the men's facilities would make other employees feel "concerned" or "uncomfortable." As such, the business judgment instruction was properly excluded.

In sum, the Court finds Instruction 17 was properly given to the jury. The Court further finds it was required to give Instruction 17 because it was a correct, applicable statement of the law, was requested by Vroegh, and was not reflected in the other instructions. As such, Defendants were not prejudiced by its inclusion. Again, the Court finds the business judgment jury instruction was properly excluded.

6. Instruction 21.

Defendants last contend that the absence of the term "punishment" from Instruction 21 constitutes error. Defendants requested the term to be added, but were denied because its inclusion was unnecessary. In challenging Instruction 21, Defendants allege that the jury acted, at least in part, out of a desire to punish Defendants for their actions.

The relevant portion of Instruction 21 stated as follows:

> Instruction 21.
> Damages.
>
> . . .
>
> Remember that, throughout your deliberations, you must not engage in any speculation, guess, or conjecture. Your judgment must not be exercised arbitrarily or out of sympathy or bias for or against any of the parties. You must award the full amount of damages, if any, that the plaintiff has proved by the preponderance of the evidence. However, the amount you assess for damages must not exceed the amount proximately caused by the wrongful conduct of the defendants as proved by the evidence. Also, do not allow any amount awarded for one item of damages on a particular claim to be excluded in any amount awarded for any other item of damages on that claim, because the plaintiff is not entitled to recover duplicate damages.

The Court finds Defendants' argument meritless. While it is true that the Court is compelled to give an instruction if it states a correct rule of law applicable in the case, the Court "is not required to give any particular form of an instruction; rather, the court must merely give instructions that fairly state the law as applied to the facts of the case." *Marin*, 788 N.W.2d at 838. Further, a court is not required to give a requested jury instruction if the concept requested is already embodied in other instructions. *Becker*, 818 N.W.2d at 142. As is well-established in Iowa, jury instructions are read as a whole.

More so, the concept of "punishment" is already included within the jury instructions as provided. Instruction 21 states "Your judgment must not be exercised arbitrarily or out of

sympathy or bias for or against any of the parties." The preliminary statement of the case states "Do not allow sympathy or prejudice to influence you. The law demands of you a just verdict, unaffected by anything except the evidence, your common sense, and the law as I give it to you." Instruction 1 provides that the jury should consider all of the instructions together, and admonished the jurors to "not be influenced by any personal likes or dislikes, sympathy, bias, prejudices, or emotions." Instruction 17 told the jury to "Remember you are not partisans or advocates, but are judges - judges of the facts. Your sole interest is to find truth and do justice." When considered together, the jury is admonished not to allow arbitrariness, sympathy, bias, prejudice, personal likes or dislikes, or emotions to influence their verdict or the amount awarded in damages. It is clear that prohibiting the jury from punishing Defendants was already included within the language of the instructions. The Court is not required to give a particular form of instruction when it is requested, it is only required that the instruction be given if its concept is not already contained within the other instructions. The jury knew and was instructed not to use the verdict and damages award to punish Defendants, for the concept of "punishment" was already embodied within the other instructions provided to the jury.

Further, Instruction 21 as given has been approved by both state and federal courts in Iowa. *See Gray v. Hohenshell*, 2019 WL325015, *6 (Iowa Ct. App. Jan. 23, 2019); Jury Instruction No. 7 in *Raymond v. U.S.A. Healthcare Ctr.*, N.D. Iowa Civil No. 05-3074 (2007) (J. Mark Bennett); Final Jury Instruction No. 6 in *Davidson v. Kinseth Hospitality Corp. et al*, N.D. Iowa Civil No. 05-3037 (2006) (J. Bennett). Even the Eighth Circuit's Model Civil Instruction 5.70 provides that including the term "punishment" "may be given at the trial court's discretion," but it is not required. Model Instruction 5.70, *Notes of Use*, par. 9 (2019). The Court agrees. The form and language of Instruction 21 fairly states the law in Iowa and has been used favorably before. Thus,

the Court does not find it was legal error to permit the use of the Instruction. The Court further finds Defendants were not prejudiced by the instruction as provided. The Instruction properly states the law, did not confuse or mislead the jury, and it did not unduly emphasize any portion of law or fact improperly. *See Anderson*, 620 N.W.2d at 268. Consistent with standard in *Anderson*, no prejudice resulted to Defendants. *Id*.

F. Defendants' Motion for New Trial: Remittitur.

Defendants next allege they are entitled to a new trial or remittitur on damages. They claim that the $120,000 damages award was excessive and appears to have been influenced by passion or prejudice. Defendants allege this damages award to Vroegh substantially prejudiced their rights, failed to administer substantial justice, and the amount is not sustained by sufficient evidence or is contrary to the law. *See* Iowa R. Civ. Pro. 1.1004(4)(6).

"When a damage verdict is excessive because it is not supported by sufficient evidence, we may order a remittitur as a condition to avoiding a new trial." *Jasper v. H. Nazam, Inc.*, 764 N.W.2d 751, 777 (Iowa 2009) (internal citations omitted). In considering whether to grant remittitur, the Court applies the following standard:

> We will reduce or set aside a jury award only if it (1) is flagrantly excessive or inadequate; or (2) is so out of reason as to shock the conscience or sense of justice; or (3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or (4) is lacking in evidentiary support.
>
> The most important of the above enumerated tests is support in the evidence. If the verdict has support in the evidence the others will hardly arise, if it lacks support they all may arise.

Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 596 (Iowa 1999) (citing *Tullis v. Merrill,* 584 N.W.2d 236, 241 (Iowa 1998), *which quotes Rees v. O'Malley,* 461 N.W.2d 833, 839 (Iowa 1990)); *see also Delaney v. Bogs*, 2015 WL7075815, *4 (Iowa Ct. App. 2015) (citing the same standard). "If a verdict meets this standard or fails to do substantial justice between the

parties, we must either grant a new trial or enter remittitur." *Id*. (internal citation omitted). An excessive damages award raises a presumption that the verdict was the product of improper passion or prejudice. *Jasper*, 764 N.W.2d at 771. As it relates to this case, ICRA emotional distress damages cannot be punitive in nature. *City of Hampton v. Iowa Civil Rts. Comm'n*, 554 N.W.2d 532, 537 (Iowa 1996).

Iowa Rule of Civil Procedure 1.1004(4) provides a new trial may be warranted if "excessive or inadequate damages appearing to have been influenced by passion or prejudice." Often interconnected but set-out separately, Rule 1.1004(6) states a new trial is required if the "report or decision is not sustained by sufficient evidence, or is contrary to law." However, Iowa's courts are hesitant to disturb a jury award if the amount is within a reasonable range based on the evidence, as "it is not for us to invade the province of the jury." *Henneman v. McCalla*, 148 N.W.2d 447, 459 (Iowa 1967).

Under the ICRA, a plaintiff can recover emotional distress damages if they were discriminated against in violation of the Act. *Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 382-84 (Iowa 1986). An award of emotional distress damages must be supported evidence of "a genuine injury." *Forshee v. Waterloo Indus., Inc*., 178 F.3d 527, 531 (8th Cir. 1999). "Awards for pain and suffering are highly subjective and should be committed to the sound discretion of the jury, especially when the jury is being asked to determine injuries not easily calculated in economic terms." *Eich v. Bd. of Regents for Cent. Mo. St. Univ.*, 350 F.3d 752, 763 (8th Cir. 20003) (internal quotations omitted).

The range of acceptable emotional distress damages is broad. For instance, in *Fuller*, the Eighth Circuit found an award for $65,000 in emotional distress damages was an acceptable award that did not shock the conscience. 618 F.3d at 865-66. There, the award amount was based almost

entirely on the plaintiff's own testimony, yet the court found the $65,000 damages award was proper. *Id*. The Eighth Circuit has also previously held that awards ranging between $50,000 and $150,000 were acceptable, and those awards did not shock the conscience. *Id*. (referencing *Delph v. Dr. Pepper Bottling Co., Inc.,* 130 F.3d 349, 358 (8th Cir.1997) (allowing damages for emotional distress of $50,000, even where "the emotional and physical complaints are vague and ill-defined, and are not characterized as especially intense"); *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1067 (8th Cir.1997) ("After carefully reviewing the evidence, we conclude that, although an award of $1.75 million for emotional distress is grossly excessive, an award of $100,000 is not."); *Kimzey v. Wal–Mart Stores, Inc.,* 107 F.3d 568, 570 (8th Cir.1997) ($35,000); *Kientzy v. McDonnell Douglas Corp.,* 990 F.2d 1051, 1054 (8th Cir.1993) ($150,000)). Several courts have found a reasonable range for emotional distress damages in a discrimination case to be even broader.

Here, the jury awarded Vroegh $100,000 in past emotional distress damages for IDOC's and Wachtendorf's denying Vroegh access to the men's facilities. The jury also awarded $20,000 for DAS's discrimination in its provision of employee benefits. At trial, Vroegh testified that he felt significant pain, humiliation, and went to a "deep place" based on the continued prohibition of using the men's facilities. Vroegh's wife testified that her husband often cried and has been "withdrawn" in recent months. Vroegh's doctor, Dr. Freund, testified that Vroegh's gender dysphoria worsened, making his transition more difficult. Vroegh no longer felt comfortable or "safe" in using the men's restroom in public. Vroegh's wife also testified her husband was having suicidal thoughts connected with the discrimination he faced at work. As it relates to DAS and his insurance coverage, Vroegh testified DAS's discriminatory denial of insurance coverage for GCS caused him to experience greater anxiety and depression. Dr. Priest, a testifying-expert for Vroegh,

stated that denying transgender individual's access to facilities that are consistent with their sexual and gender identity is "extremely harmful."

Based on the facts presented at trial and now before the Court, the Court finds sufficient evidence supports the jury's verdict and its amount, which does not shock the Court's conscience and fell within the range the Court deems reasonable. Significant evidence was introduced providing the causal connection between the emotional harm suffered by Vroegh and the discriminatory conduct of Defendants. Similarly, significant evidence exists to support a $20,000 finding that DAS's denial of insurance coverage for GCS exacerbated Vroegh's psychological issues and made his transition more difficult. The experts who testified corroborated the causal connection between the discriminatory conduct of Defendants and the harm suffered by Vroegh. In so finding, the Court determines the combined $120,000 damages award was reasonable, does not shock the conscience, and promotes substantial justice.

Thus, under Rule 1.1004(4), the Court does not find the award to be excessive or improperly based on passion or prejudice towards Defendants. Under Rule 1.1004(6), the damages award for Vroegh is sustained by sufficient evidence and is not contrary to law. As such, Defendants' request for remittitur is denied. In the alternative, Defendants' motion for a new trial based on excessive damages is denied.

G. Defendants' Motion for Judgment Notwithstanding the Verdict: Whether Patti Wachtendorf Should Have Been Dismissed in her Individual Capacity.

Defendants next request the Court to award a judgment notwithstanding the verdict in favor of defendant Wachtendorf. Defendants' claim Wachtendorf should have been dismissed in her individual capacity because all evidence presented concerned her actions and decisions within her professional capacity as warden of ICIW.

The Court applies the same principles when considering a motion for judgment notwithstanding the verdict as it does when considering a motion for directed verdict. *Easton*, 751 N.W.2d at 4; Iowa R. Civ. Pro. 1.1003 (2020). Thus, when deciding a motion for judgment notwithstanding the verdict, the Court must view the evidence in the light most favorable to the nonmoving party. *Kamerick*, 503 N.W.2d at 25. Granting such a motion is only appropriate if (1) the adverse party failed to allege a material fact required to constitute a complete claim, or (2) if the moving party was entitled to a directed verdict at trial, but was not granted one, and the jury did not rule in their favor. Iowa R. Civ. Pro. 1.1003(1)-(2) (2020). In the alternative, granting a motion for judgment notwithstanding the verdict is inappropriate if the nonmoving party presented substantial evidence that supported their claims. *Kamerick*, 503 N.W.2d at 26.

The Iowa Supreme Court has clearly held "that a supervisory employee is subject to individual liability for unfair employment practices under Iowa Code section 216.6(1) of the Iowa Civil Rights Act." *Vivian*, 601 N.W.2d at 878. Section 216.6(1), the Iowa Code provision regarding unfair employment practices, uses the term "person" and not "employer," as does the entire chapter. *Id*. Our Supreme Court reasoned that "The legislature's use of the words 'person' and 'employer' . . . indicates a clear intent to hold a 'person' subject to liability separately and apart from the liability imposed on an 'employer.'" *Id*. (internal citations omitted). The Court further reasoned that "A contra[ry] interpretation would strip the word 'person' of any meaning and conflict with our maxim of statutory evaluation that laws are not to be construed in such a way as to render words superfluous." *Id*. (internal citations omitted).

With this in mind, the Defendants misunderstand the application of the ICRA. Wachtendorf was in control of whether Vroegh was discriminated against and denied Vroegh access to the men's facilities. As in *Vivian*, Wachtendorf was not required to have individually and independently

discriminated in order to be sued in her individual capacity. *Id*. at 872-73 (recognizing that the employer did not take any discriminatory action, but was still properly sued in his individual capacity). The terms of the ICRA permit her to be sued individually, no matter if she acted in her individual capacity or not. Thus, the Court properly declined Defendants' motion for a directed verdict at trial and denies their request for judgment notwithstanding the verdict now.

H. Defendants' Motion for Judgment Notwithstanding the Verdict: Sex Discrimination and 216.6A Claims.

Defendants request the Court to enter judgment notwithstanding the verdict because they claim Vroegh's 216.6A and his sex discrimination claims are not supported by substantial evidence. As included in their Motion, Defendants make no new argument for the Court to consider on these matters. Thus, the Court has already determined that Vroegh's sex discrimination claim was proper and supported by substantial evidence, and the Court hereby incorporates all relevant analyses and conclusions found above. Additionally, the Court has already determined that Vroegh properly brought his claim for employment benefits discrimination consistent with Iowa Code section 216.6A(2)(b). The Court as such denies Defendants' motion for judgment notwithstanding the verdict as to both claims.

I. Whether Defendants' Were Entitled to "Same Decision" Affirmative Defense Instruction.

Following the Iowa Supreme Court's decision in *Hawkins*, Defendants ask the Court to order a new trial. Defendants allege the "same decision" affirmative defense, which was not included at trial, and the "business judgment instruction" are intertwined. More applicably, Defendants claim that because employers are entitled to the same decision affirmative defense following *Hawkins*, it was legal error to not instruct the jury on their defense. The Court disagrees.

The same decision instruction provides that "when an employee proves discrimination was a motivating factor in the employer's actions, the employer could avoid liability 'by proving by a

preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender [or other protected characteristics] into account." *Hawkins*, 929 N.W.2d at 272 (citing *Price Waterhouse*, 490 U.S. at 258). The same decision instruction is based on the same-decision affirmative defense, which Iowa officially adopted into the ICRA framework in the Court's *Hawkins* decision. *Id*. To be proper, "every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial." Iowa R. Civ. Pro. 1.421 (2020); *see also Hawkins*, 929 N.W.2d at 272.

Here, Defendants claim their inclusion of "affirmative defenses" 8 and 9 in their Answer permit reversal to properly instruct the jury in a manner now consistent with *Hawkins*. Affirmative Defense 8 states "Defendants preserve all statutory defenses to liability and damages available to them by this reference." Affirmative Defense 9 states "Defendants reserve the right to assert additional affirmative defenses and points of law." However, the Court finds these "affirmative defenses" contained in Defendants' Answer irrelevant, because a reservation of a party's rights "[i]s not a matter 'properly pleaded as an affirmative defense." *Hydra–Stop, Inc. v. Severn Trent Environm'l Servs., Inc.*, 2003 WL 22872137, *5 (N.D. Ill. Dec. 3, 2003). It is unnecessary to explicitly reserve a right to plead additional affirmative defenses when "there is no procedure for reserving a right to plead affirmative defenses at a later date." *Dresser Industries, Inc. v. Pyrrhus AG*, 936 F.2d 921, 928 n.6 (7th Cir.1991). Instead, as the Iowa Rules of Civil Procedure provide, the same decision affirmative defense was required to be plead as an amendment within 20 days after service of their Answer. Iowa R. Civ. Pro. 1.421 (2020). As the Defendants failed to file such an amendment to their Answer, the only way to bring the same decision affirmative defense would have been for Defendants to have asked the Court, by motion, for leave to amend their pleadings

to add additional affirmative defenses. This did not happen. As such, the same decision affirmative defense was waived by Defendants. Iowa R. Civ. Pro. 1.421(4) (2020). As Defendants waived the same decision affirmative defense, no grounds exist warranting a grant of a new trial in order for Defendants to plead and instruct the jury on the same decision defense. The mere act of requesting the same decision instruction is not enough to overcome Defendants' waiver.

The Court also finds the same decision and business judgment instructions are distinguishable from one another. The business judgment instruction is not an affirmative defense at all. Thus, the Court incorporates its reasons for denying the business judgment instruction, as detailed above. The Court holds that the same decision affirmative defense was waived by Defendants and, as such, its absence from this case does not warrant granting a new trial.

J. Vroegh's Request for Attorney Fees and Expenses.

At the close of trial, the jury returned a verdict in Vroegh's favor on all counts. In so doing, the jury awarded $100,000 in past emotional distress damages for IDOC and Wachtendorf's discrimination based on Vroegh's sex and gender identity by denying him the use of the men's facilities. The jury also awarded $20,000 in past emotional distress damages for IDOC and DAS's discrimination based on their denial of health insurance coverage for Vroegh to undergo GCS. The verdict totaled $120,000.

As Vroegh prevailed on his underlying claims, he has now filed a post-trial motion seeking an award for attorney fees and expenses. When the Court added up Vroegh's initial requests for attorney fees and litigation, Vroegh sought a total award of $350,523.95. Following a voluntary reduction after Wellmark was dismissed as a defendant, Vroegh asks for a sum of $349,446.07.

In their briefing and legal arguments to the Court, Defendants acknowledge that Vroegh is entitled to an award of attorney fees and expenses. However, Defendants claim Vroegh's request is excessive, includes fees that pertain to Wellmark who has since been dismissed, and that the

Court should exercise its discretion to reduce the amount of the requested award. Defendants propose that the Court cut Vroegh's request and instead award him half of what is requested for a total value of $175,261.98. Defendants request this reduction unless Vroegh can provide time entries that show the time included was spent working on the case only against Defendants and not Wellmark.

1. Iowa Law Regarding the Award of Attorney Fees and Litigation Costs.

Under the ICRA, a "prevailing party" is entitled to an award of "reasonable attorney fees." See Iowa Code § 216.15(8)(a)(9). The rationale behind this award has been explained as "[t]he reason a successful civil rights litigant is entitled to attorney fees 'is to ensure that private citizens can afford to pursue the legal actions necessary to advance the public interest vindicated by the policies of civil rights acts." ' *Lynch v. City of Des Moines*, 464 N.W.2d 236, 239 (Iowa 1990) (quoting *Ayala v. Cntr. Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987)).

An applicant who seeks an attorney fee and costs award bears the burden to prove "both that the services were reasonably necessary and that the charges were reasonable in amount." *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). This requires the plaintiff to submit detailed affidavits which itemize their fee claims. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009) (internal citations omitted). Vroegh has filed affidavits in which his attorneys have detailed their work performed, their requested hourly rate, and the amount requested in litigation expenses.

Under the Lodestar Method, a fee award is calculated by multiplying the number of hours reasonably expended on the winning claims times a reasonable hourly rate. *Boyle*, 773 N.W.2d 829, 832 (Iowa 2009). This calculation is "presumed to be the reasonable attorney fee envisioned by the relevant statutes." *Id*. What constitutes a reasonable hourly rate depends on the facts of each

case. *Id*. "The district court is considered an expert in what constitutes a reasonable attorney fee." *Id*. Factors relevant for the Court when considering the reasonableness of fees include: (1) the time necessarily spent; (2) the nature and extent of the service; (3) the difficulty of handling and importance of the issues; (4) the responsibility assumed and the results obtained; (5) the standing and experience of the attorney in the profession; and (6) the customary charge for similar service. *Id*. at 832-33. Moreover, the Court "must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case." *Landals*, 454 N.W.2d at 897. The Court should reduce the fee request if any claim is excessive, redundant, or unnecessary.

2. Attorney Fees and Litigation Costs in this Case.

Defendants claim the hours Vroegh's counsel has requested in attorney fees are not reasonable. Vroegh's request includes fees for four attorneys, two legal fellows, two law clerks, and two paralegals. All four attorneys were present for the entirety of the trial. Defendants assert that paying for four attorneys is excessive and redundant.

Mr. Knight conducted the direct examination of Vroegh's experts. Ms. Aurora argued Vroegh's motions in limine and all directed verdict motions. With regard to summary judgment, Ms. Bettis Austen requests payment for 24.6 hours of preparation.

Defendants next allege that Mr. Knight and Ms. Austen should be compensated at an hourly rate of $300, consistent with the rate of Mr. Hasso, a private attorney. The Court recognizes that Mr. Knight seeks a $500 hourly rate, Ms. Bettis Austen seeks a $300 hourly rate, and Ms. Aurora seeks a $250 hourly rate. Each legal fellow is billed at an hourly rate of $200, and their law clerk's time is billed at an hourly rate of $125. As Defendants request Ms. Bettis Austen and Mr. Knight's time is reduced to $300, they ask for a comparable reduction in the rates for their legal fellows,

law clerks, and paralegals, as well. Defendants reason that the nonprofit attorneys in this case should not bill at a higher rate than private attorneys and, as such, their fees should be reduced.

Defendants further seek a reduction in litigation costs in reference to the Iowa ACLU. Vroegh seeks a combined cost of $6,157.20 to be awarded. This amount includes the $185 filing fee, a $24 copy of the motion to dismiss transcript, and $5,948.20 for deposition costs for Dr. Timothy Gutshall, Amanda Nelson, Kerri Friedhoff, Patti Wachtendorf, Amy Liechti, James Pierson, Kevin Beichley, Dr. Harbans Deol, Janet Phipps, Edward Holland, and Christopher Wolfe. Defendants claim these costs should be reduced by 50 percent due to the dismissal of Wellmark. They further ask the Court remove the $24 cost of the motion to dismiss transcript as it was not used for subsequent motions or appeals. Defendants request only the cost of Dr. Deol's deposition be awarded. Defendants additionally ask that the $185 filing fee be reduced by 50 percent, as Wellmark was included as a defendant at the time of the original filing costs.

Defendants also ask the Court to reduce the $2,458.55 in costs incurred by Sherinian & Hasso Law Firm. Of that cost, $1,277.10 is requested for printing ($417.40) and copying ($859.70). Defendants rely on Iowa Code section 625.6, which limits the costs that are recoverable to those filed as a part of the testimony and the actual portion of documents admitted at trial. Defendants additionally ask the ICRC copies ($124.24) and medical record costs ($126.78) should be limited under the same logic. Defendants aptly recognize the $185 filing fee is duplicative, as it is already included under the costs for the Iowa ACLU. Hasso also seeks $168.25 for legal research costs, which Defendants claim that Eighth Circuit precedent makes such costs unrecoverable. However, this statement of the law does not reflect the current rule, which allows for the reasonable costs associated with online research. *See In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 631 F.3d 913, 918 (8th Cir. 2011). In the alternative, Defendants ask

the cost for legal research be reduced by half. The Firm also seeks $300 for the cost of a focus group, as well as $64 for the costs of refreshments. Last, Hasso seeks to recover $202.78 for the cost of office supplies, which Defendants contend is not a properly recoverable cost under the law.

Vroegh further seeks $2,630.02 for other costs, which comprise Mr. Knight's travel and expenses in coming from Chicago to Des Moines for the case and for trial. Defendants summarily request that Mr. Knight's attendance at trial was unnecessary and should be reduced, at least after February 8, 2019, when Mr. Knight examined no additional witnesses.

Ms. Bettis Austen's affidavit already excludes $27,840 in fees attributable to Wellmark, in addition to Mr. Knight's affidavit of costs, which excludes $12,650 in fees attributable to Wellmark. "The vindication of civil rights is so significant that the method of calculating attorney fees should not vary between state and federal courts. Therefore, we adopt the federal analytical framework for the calculation of attorney fees under the [ICRA]." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897-98 (Iowa 1996). Vroegh claims Ms. Aurora was needed at the entire trial to argue motions and observe all evidence and rulings of the court to adequately perform her role. Likewise, Vroegh contends that Mr. Knight's presence was necessary for the entire trial in order to be responsive and consistent with integrating the expert opinions into testimony and all arguments, including closing arguments. Vroegh summarizes that all attorneys were necessary for the seven day trial when litigating a highly visible and important civil rights case in Iowa.

Further, Vroegh responds by stating that the time for all attorneys to meet was necessary to form their trial strategy, plan, as well as coordinate and divide litigation tasks for three years' worth of litigation. He further observes that Defendants provided no support for why Ms. Bettis Austen's 24.6 hours to prepare for his summary judgment motion was excessive. However, Ms. Bettis Austen did reduce the time spent preparing Vroegh's motion by 8.4 hours, which was the

time spent litigating claims related to Wellmark. As it relates to the Hasso Law Firm, Vroegh asserts that the focus group and other miscellaneous fees are akin to those which a private attorney would charge for and, thus, are recoverable now.

Vroegh challenges Defendants' claim that the nonprofit public interest lawyers in this case should be subject to a lower hourly rate, instead asserting that they should be compensated at the prevailing market rate in the relevant community. In support of this claim, Vroegh relies on *Blum v. Stenson*, where the U.S. Supreme Court found that the calculation of attorney's fees by statute was not intended to vary between private and public-interest attorneys. 460 U.S. 886, 893-95 (1984). In summation, Vroegh has amended the value fees and costs requested to exclude 0.6 hours accidentally included for work connected with Wellmark, as well as 0.8 hours which was accidentally included for the cost of drafting a withdrawn motion. Vroegh has also removed the redundant filing fee cost. He further reduced his request by $305.50, which is the cost of James Pierson's deposition. Last, Vroegh removed the request for Mr. Knight's second roundtrip flight to Des Moines from Chicago during trial, valued at $587.38. The final value requested, again, is $349,446.07, a reduction of $1,077.88 from his original request.

The Court has reviewed the itemized billings closely. The Court makes the following cost assessments and adjustments. The Court has reduced the filing fee cost of $185 to $138.75. This reflects a 25 percent reduction in the cost of the filing fee (four defendants: IDOC, DAS, Wachtendorf, and Wellmark) based on the dismissal of Wellmark. The Court finds this adjustment fair and equitable based on the number of defendants present at the beginning of this action. The Court also finds that the $5,642.70 is the proper cost for depositions, which reflects Vroegh's voluntary exclusion of the cost of Mr. Pierson's deposition. Depositions are an essential part of any case, and the Court finds these fees to be reasonable. The Court has reduced the requested

costs by $613.55 with regard to the cost of printing and copying at Hasso Law Firm, representing a reduction of half. The Court found the value to be excessive and it could not adequately determine what was included in this sum. The Court has also reduced the legal research costs for Hasso to $100, a reduction of $68.25. This reduction is reflective that online legal research is more accessible and, as a result, can be less expensive. Likewise, the Court finds the cost of office supplies to be excessive as billed, and the inclusion of refreshments improper. As such, the Court has reduced the requested fee amounts by $64, eliminating the cost of refreshments, and has reduced the cost awarded for office supplies to $100, which represents a $102.78 reduction. The Court likewise denies the request to be reimbursed for the motion to dismiss transcript, which was not used. The total sum will be reduced by $24 to reflect this exclusion. While the Court agrees with Vroegh that focus groups or mock juries can be necessary in cases such as this, the Court finds the expense for the focus group unnecessary based on the caliber and skill of Vroegh's attorneys. The Court thereby denies the reimbursement of the focus group. The total value reflects this $300 reduction.

However, the Court finds the cost of the medical records and ICRC proceedings to be relevant and important to Vroegh's claims for discrimination and emotional distress damages. As such, those fees should be reimbursed to Vroegh and his counsel.

The Court has also approved the costs of attorney fees and other staff who worked on this case for nearly four years. The Court finds Ms. Bettis Austen, based on her experience, education, advocacy, and work on the case shall be awarded her time at an hourly rate of $300, as requested. This amount is consistent with the Des Moines Market for an attorney who has practiced for nearly ten years and has significant experience in employment discrimination and civil rights law in Iowa.

All costs associated with Ms. Aurora, the relevant legal fellows, paralegals, and law clerks are properly billed based on similar rates in like-cases tried in Iowa, specifically Polk County.

The Court finds Mr. Knight, based on his 32 years of experience, his education, skilled advocacy, and his work on the case shall be awarded his time at an hourly rate of $500, as requested. This amount is consistent with his prior rate in Iowa cases, as well as his significant experience in litigating claims of this sort. Further, the Court recognizes that Mr. Knight should be compensated for attending trial in order to assist counsel with presenting a cohesive case to the jury.

Likewise, the Court finds Mr. Hasso, based on his experience, education, advocacy, and work on the case shall be awarded his time at an hourly rate of $300, as requested. This amount is consistent with the Des Moines Market for an attorney that has significant experience in employment discrimination and civil rights law in Iowa. This has been found reasonable in the past, especially in light of his experience in employment discrimination claims.

All attorney fees, under the lodestar method, were therefore accurately reflected by Vroegh's attorney's affidavits. The Court further appreciates the detailed accounting of time and costs by his counsel, especially in excluding the time worked on Wellmark's claims.

Therefore, the Court finds the total sum of attorney fees and costs to be awarded is $348,227.24. This case went on for three years and now edges closely to a fourth year in 2020. The value articulated represents the reasonable cost of attorney fees for this duration with regard to Vroegh's legal team. The Court has determined the hourly rates of each attorney for Vroegh, as requested, match the market value of similar services within the community. The requested costs have been reduced by $1,218.83 to reflect the aforementioned reductions, which were considered to be improper or unnecessary.

IV. ORDER

IT IS THEREFORE ORDERED that Defendants' Motion for New Trial and Judgment Notwithstanding the Verdict is **DENIED** in its entirety.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney Fees and Costs is **GRANTED** and judgment is entered in favor of Vroegh and against Defendants, jointly and severally, in the amount of $348,227.24 for attorney fees and costs.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACL138797	JESSE VROEGH VS IOWA DEPARTMENT OF CORRECTIONS

So Ordered

Scott D. Rosenberg

Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa